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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,)
) CR-18-00258-EJD
 PLAINTIFF,)
) SAN JOSE, CALIFORNIA
 VS.)
) OCTOBER 6, 2020
 ELIZABETH A. HOLMES AND RAMESH)
 9 SUNNY BALWANI,) PAGES 1 - 96
)
 10 DEFENDANTS.)
)
 11 _____)

TRANSCRIPT OF ZOOM PROCEEDINGS
BEFORE THE HONORABLE EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE
BY: JOHN C. BOSTIC
JEFFREY B. SCHENK
150 ALMADEN BOULEVARD, SUITE 900
SAN JOSE, CALIFORNIA 95113

BY: ROBERT S. LEACH
VANESSA BAEHR-JONES
1301 CLAY STREET, SUITE 340S
OAKLAND, CALIFORNIA 94612

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER:

IRENE L. RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

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A P P E A R A N C E S: (CONT'D)

FOR DEFENDANT HOLMES: WILLIAMS & CONNOLLY LLP
BY: KEVIN M. DOWNEY
LANCE A. WADE
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AMY SAHARIA
ANDREW LEMENS
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FOR DEFENDANT BALWANI: ORRICK, HERRINGTON & SUTCLIFFE LLP
BY: JEFFREY COOPERSMITH
AMANDA MCDOWELL
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BY: STEPHEN CAZARES
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LOS ANGELES, CALIFORNIA 90017

1 SAN JOSE, CALIFORNIA

OCTOBER 6, 2020

2 P R O C E E D I N G S

3 (COURT CONVENED AT 10:05 A.M.)

4 THE COURT: ALL RIGHT. THANK YOU, MS. KRATZMANN.

5 LET'S NOW CALL THIS MATTER. THIS IS 18-258, UNITED STATES
6 VERSUS ELIZABETH HOLMES AND SUNNY BALWANI.

7 THANK YOU FOR SIGNING IN.

8 LET ME FIRST CAPTURE THE APPEARANCES OF THE PARTIES FOR
9 THE RECORD, PLEASE. AND I'LL ASK THE GOVERNMENT TO GO FIRST,
10 AND THEN I'LL ASK DEFENSE TO PROCEED.

11 ALSO, AS TO THE DEFENSE, I WANT YOU TO, WHEN YOU MAKE YOUR
12 APPEARANCE, IF YOU WOULD PLEASE INFORM ME AND INFORM US AS TO
13 WHETHER OR NOT THAT YOU HAVE ADVISED YOUR CLIENT OF THE RIGHT
14 TO APPEAR PERSONALLY IN COURT AT A LATER DATE, AND ALSO IF YOU
15 WOULD INFORM ME FOR THE RECORD WHETHER OR NOT YOUR CLIENT
16 CONSENTS TO PROCEEDING VIA THE REMOTE PROCEEDINGS THAT WERE
17 ENGAGED TODAY.

18 LET ME INDICATE THAT WE HAVE ENGAGED REMOTE PROCEEDINGS IN
19 OUR COURTS HERE IN THE NORTHERN DISTRICT OF CALIFORNIA OWING TO
20 THE COVID PANDEMIC. WE ARE MITIGATING THE APPEARANCE OF
21 PARTIES IN OUR COURTHOUSES FOR THE SAFETY OF THE PUBLIC, THE
22 SAFETY OF LITIGANTS, AND, OF COURSE, THE SAFETY OF OUR STAFF.
23 WE'VE ENGAGED REMOTE HEARINGS TO ACCOMPLISH THIS.

24 AND AGAIN, DEFENSE COUNSEL, AGAIN, IF YOU COULD PLEASE LET
25 ME KNOW WHEN THEY MAKE THEIR APPEARANCES WHETHER OR NOT THEIR

10:07AM 1 CLIENT CONSENTS TO THESE PROCEEDINGS AS INDICATED.

10:07AM 2 SO LET ME START WITH THE GOVERNMENT. WHO APPEARS FOR THE
10:07AM 3 GOVERNMENT THIS MORNING?

10:07AM 4 MR. LEACH: GOOD MORNING, YOUR HONOR.

10:07AM 5 ROBERT LEACH ON BEHALF OF THE UNITED STATES.

10:07AM 6 I'M JOINED BY JEFF SCHENK, JOHN BOSTIC, AND
10:07AM 7 VANESSA BAEHR-JONES.

10:07AM 8 THE COURT: GREAT. THANK YOU. GOOD MORNING
10:07AM 9 EVERYONE.

10:07AM 10 LET'S START THEN WITH MS. HOLMES. WHO APPEARS FOR
10:07AM 11 MS. HOLMES?

10:07AM 12 MS. SAHARIA: GOOD MORNING, YOUR HONOR.

10:07AM 13 THIS IS AMY SAHARIA FOR DEFENDANT ELIZABETH HOLMES.

10:07AM 14 APPEARING WITH ME TODAY ARE KEVIN DOWNEY AND LANCE WADE.

10:07AM 15 AND I WOULD LIKE TO INTRODUCE THE COURT TO MY COLLEAGUES,

10:07AM 16 KATHERINE TREFZ AND ANDREW LEMENS, WHO ARE ALSO APPEARING AND

10:07AM 17 WILL BE ARGUING SOME OF TODAY'S MOTIONS.

10:08AM 18 WE HAVE ADVISED MS. HOLMES OF HER RIGHT TO APPEAR IN

10:08AM 19 PERSON. SHE DOES CONSENT TO APPEARING REMOTELY TODAY GIVEN THE

10:08AM 20 PUBLIC HEALTH SITUATION, AND WE DO HAVE THE CAPACITY TO CONSULT

10:08AM 21 WITH MS. HOLMES OFFLINE IF NEED BE, AND I WILL LET THE COURT

10:08AM 22 KNOW IF THAT BECOMES NECESSARY.

10:08AM 23 THE COURT: ALL RIGHT. THANK YOU. GOOD MORNING

10:08AM 24 EVERYONE.

10:08AM 25 I'M HAPPY TO MEET THE NEW PEOPLE JOINING.

10:08AM 1 LET ME TURN TO MS. HOLMES, THOUGH.

10:08AM 2 MS. HOLMES, ARE YOU ABLE TO SEE AND TO HEAR THESE
10:08AM 3 PROCEEDINGS CURRENTLY?

10:08AM 4 DEFENDANT HOLMES: I AM, YOUR HONOR.

10:08AM 5 THE COURT: ALL RIGHT. THANK YOU VERY MUCH.

10:08AM 6 AND YOU HEARD MS. SAHARIA, IF YOU NEED TO OR WISH TO SPEAK
10:08AM 7 WITH ANY OF YOUR COUNSEL, WOULD YOU PLEASE ENGAGE THE PROTOCOLS
10:08AM 8 THAT YOU HAVE DEVELOPED SUCH THAT I CAN BE INFORMED. I'LL STOP
10:08AM 9 THE PROCEEDINGS AND ALLOW YOU TO CONSULT PRIVATELY WITH YOUR
10:08AM 10 COUNSEL SHOULD THAT BE REQUIRED.

10:08AM 11 WOULD YOU DO YOU THAT, PLEASE?

10:08AM 12 DEFENDANT HOLMES: I WILL. THANK YOU VERY MUCH,
10:08AM 13 YOUR HONOR.

10:08AM 14 THE COURT: YOU'RE WELCOME.

10:08AM 15 AND WHO APPEARS FOR MR. BALWANI?

10:09AM 16 MR. COOPERSMITH: GOOD MORNING, YOUR HONOR.

10:09AM 17 THIS IS JEFF COOPERSMITH ON BEHALF OF MR. BALWANI, AND I'M
10:09AM 18 JOINED BY MY COLLEAGUES, STEPHEN CAZARES AND AMADA MCDOWELL.

10:09AM 19 MR. BALWANI IS ALSO PRESENT ON ZOOM. WE HAVE ADVISED
10:09AM 20 MR. BALWANI OF HIS RIGHT TO APPEAR IN PERSON, BUT IN LIGHT OF
10:09AM 21 THE COVID CRISIS HE DOES CONSENT TO APPEARANCE BY ZOOM THIS
10:09AM 22 MORNING. AND WE DO HAVE THE ABILITY, IF NECESSARY, TO CONSULT
10:09AM 23 WITH MR. BALWANI OUTSIDE OF THE ZOOM PROCEEDING.

10:09AM 24 THE COURT: ALL RIGHT. THANK YOU. GOOD MORNING
10:09AM 25 EVERYONE. THANK YOU FOR YOUR APPEARANCE.

10:09AM 1 MR. BALWANI, LET ME REACH OUT TO YOU, SIR. ARE YOU ABLE
10:09AM 2 TO HEAR AND SEE THESE PROCEEDINGS CURRENTLY, SIR?

10:09AM 3 DEFENDANT BALWANI: YES, YOUR HONOR, I CAN.

10:09AM 4 THE COURT: AND YOUR COUNSEL HAS INFORMED ME THAT HE
10:09AM 5 HAS ENGAGED A PROTOCOL SUCH THAT IF YOU WISH TO SPEAK WITH HIM
10:09AM 6 PRIVATELY OR ANY OF YOUR LAWYERS PRIVATELY, YOU CAN ENGAGE THAT
10:09AM 7 PROTOCOL.

10:09AM 8 YOU KNOW HOW TO DO THAT I PRESUME?

10:09AM 9 DEFENDANT BALWANI: YES, YOUR HONOR. THANK YOU. I
10:10AM 10 CAN.

10:10AM 11 THE COURT: SO IF THAT SHOULD ARISE THAT YOU WISH TO
10:10AM 12 SPEAK WITH YOUR COUNSEL, PLEASE LET ME KNOW OR ENGAGE THAT
10:10AM 13 PROTOCOL AND I'LL, OF COURSE, ALLOW YOU TO SPEAK PRIVATELY WITH
10:10AM 14 YOUR COUNSEL.

10:10AM 15 ALL RIGHT, SIR?

10:10AM 16 DEFENDANT BALWANI: THANK YOU, YOUR HONOR. YES.

10:10AM 17 THE COURT: YOU'RE WELCOME.

10:10AM 18 ALSO, IF FOR ANY REASON, AS TO MR. BALWANI AND MS. HOLMES,
10:10AM 19 IF THE CONNECTION FAILS OR FOR SOME REASON YOU ARE UNABLE TO
10:10AM 20 CONTINUE HEARING AND/OR SEEING THESE PROCEEDINGS, I'D LIKE YOU
10:10AM 21 TO CONTACT YOUR ATTORNEYS IMMEDIATELY SO WE CAN STOP THE
10:10AM 22 PROCEEDINGS AND CORRECT THAT ISSUE.

10:10AM 23 ALL RIGHT, MR. BALWANI?

10:10AM 24 DEFENDANT BALWANI: YES, SIR. THANK YOU.

10:10AM 25 THE COURT: MS. HOLMES?

10:10AM 1 DEFENDANT HOLMES: YES. THANK YOU.

10:10AM 2 THE COURT: ALL RIGHT. THANK YOU VERY MUCH.

10:10AM 3 WELL, WE HAVE MOTIONS BEFORE US FILED BY THE DEFENSE.

10:10AM 4 THESE ARE DOCKETS 493, 496, 497, 498, 499, AND 500

10:10AM 5 RESPECTFULLY. THESE ARE MOTIONS TO DISMISS FOR A VARIETY OF
10:11AM 6 REASONS.

10:11AM 7 LET ME INDICATE THAT I HAVE READ AND REVIEWED YOUR
10:11AM 8 PLEADINGS. THANK YOU AGAIN FOR YOUR PLEADINGS, BOTH SIDES.
10:11AM 9 THEY CONTINUE TO BE INFORMATIVE AND HELPFUL TO THE COURT.

10:11AM 10 WHAT I THOUGHT I WOULD DO IS -- I WENT THROUGH THE
10:11AM 11 MOTIONS. IT APPEARED TO ME THAT WE MIGHT BE ABLE TO CAPTURE
10:11AM 12 SOME ARGUMENTS AS TO OVERLAP IN SOME OF THESE MOTIONS.

10:11AM 13 I -- IT APPEARS TO ME THAT -- AND WHAT I'D LIKE TO DO, AND
10:11AM 14 THIS IS THE ORDER FOR YOU, AND I APOLOGIZE FOR NOT GETTING THIS
10:11AM 15 OUT TO YOU SOONER. I THINK I GOT A LIST FROM MR. LEACH
10:11AM 16 INDICATING WHO IS GOING TO ARGUE ON BEHALF OF THE GOVERNMENT
10:11AM 17 THESE MOTIONS.

10:11AM 18 MY THOUGHT IS THAT IN THE ORDER OF THINGS THAT WE WOULD
10:11AM 19 PROCEED WITH DOCKETS 493, THE PRE-INDICTMENT DELAY; AND THEN
10:11AM 20 498, PERHAPS HAVE A DISCUSSION AS TO THOSE. THOSE SEEM TO HAVE
10:12AM 21 SOME RELATED ISSUES, AND I THINK WE CAN DISCUSS THOSE TWO
10:12AM 22 PERHAPS CLOSE IN TIME.

10:12AM 23 THE NEXT GROUPING, IF YOU WILL, I THINK, WOULD BE 496, THE
10:12AM 24 LACK OF NOTICE; AND 497, THE DUPLICITOUS ARGUMENTS.

10:12AM 25 AND THEN THIRD, I THINK THE 499, THE CONVERGENCE MOTION

10:12AM 1 WOULD FOLLOW.

10:12AM 2 LET ME INDICATE THAT I'VE READ 500. I DON'T THINK THAT
10:12AM 3 THAT REQUIRES ANY REAL SUBSTANTIVE DISCUSSION THIS MORNING. I
10:12AM 4 UNDERSTAND 500 IS SUBSUMED IN SOME OF THE OTHER MOTIONS, BUT I
10:12AM 5 DON'T THINK WE NEED TO OR THAT I NEED ANY REAL DISCUSSION OR
10:12AM 6 HELP ON 500.

10:12AM 7 BUT THESE OTHER MOTIONS, I'M HAPPY TO GIVE YOU AN
10:12AM 8 OPPORTUNITY TO DISCUSS THEM AS GROUPED AS I'VE INDICATED. I
10:12AM 9 THINK THAT WOULD PROVIDE FOR SOME EFFICIENCY. THE ARGUMENTS,
10:12AM 10 AS I SAID, IN MY VIEW SEEMED TO OVERLAP.

10:12AM 11 SO LET'S START THEN WITH 493 AND 498. 493 IS
10:13AM 12 MR. BALWANI'S MOTION; 495 IS MS. HOLMES'S JOINDER; THE
10:13AM 13 GOVERNMENT OPPOSITION IS 495; AND MR. BALWANI'S REPLY IS 496.
10:13AM 14 I'VE READ AND REVIEWED THOSE.

10:13AM 15 LET ME INDICATE THAT AS TO DISCUSSION HERE, MR. LEACH,
10:13AM 16 THIS IS, I GUESS, SPECIFIC TO YOU, THERE MAY BE DOCUMENTS THAT
10:13AM 17 ARE NOT IN THE PUBLIC RECORD RELATED TO THIS MOTION. I DON'T
10:13AM 18 THINK WE NEED TO GET INTO THOSE. I THINK WE CAN ARGUE THE
10:13AM 19 MOTION WITHOUT DISCUSSION OF THOSE. I THINK YOU CAN ANSWER
10:13AM 20 QUESTIONS THAT I HAVE WITHOUT GETTING INTO THAT, BUT, OF
10:13AM 21 COURSE, SHOULD YOU WISH TO TRAVEL THERE YOU SHOULD JUST LET ME
10:13AM 22 KNOW.

10:13AM 23 MR. LEACH: UNDERSTOOD, YOUR HONOR. THAT WAS MY
10:13AM 24 INTENT. THANK YOU.

10:13AM 25 THE COURT: GREAT. THANK YOU. ALL RIGHT. SO WHO

10:13AM 1 IS GOING TO SPEAK ON BEHALF OF THE MOVING PARTY?

10:13AM 2 IS THAT YOU, MR. COOPERSMITH?

10:13AM 3 MR. COOPERSMITH: YES, YOUR HONOR. THANK YOU.

10:14AM 4 THE COURT: SURE. WHAT WOULD YOU LIKE ME TO KNOW
10:14AM 5 ABOUT THIS THAT I HAVEN'T READ IN YOUR PLEADINGS?

10:14AM 6 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

10:14AM 7 SO, FIRST OF ALL, THE SECOND AND THIRD SUPERSEDING
10:14AM 8 INDICTMENTS IN THIS CASE VASTLY EXPAND THE CHARGES. AND I KNOW
10:14AM 9 THE GOVERNMENT CLAIMS THAT'S NOT THE CASE, BUT LET ME JUST
10:14AM 10 BRIEFLY TELL YOU THE FOUR WAYS IN WHICH THE CHARGES ARE VASTLY
10:14AM 11 EXPANDED.

10:14AM 12 FIRST OF ALL, IT DOUBLES THE TIME OF THE CONSPIRACY FROM
10:14AM 13 THREE YEARS TO SIX YEARS, WHICH IS OBVIOUSLY IN A CASE OF THIS
10:14AM 14 COMPLEXITY WITH THE AMOUNT OF DOCUMENTS INVOLVED QUITE
10:14AM 15 SIGNIFICANT.

10:14AM 16 IT ADDS AS VICTIMS TWO MAJOR CORPORATIONS THAT THEMSELVES
10:14AM 17 HAVE SCORES OF WITNESSES AND DOCUMENTS INVOLVED WITH THEM. SO
10:14AM 18 SAFEWAY AND WALGREENS, OF COURSE, ARE THE TWO MAJOR
10:14AM 19 CORPORATIONS THAT ARE NOW ADDED AS ALLEGED VICTIMS.

10:14AM 20 IT ALSO ADDS A WHOLE GROUP OF BOARD MEMBERS. IT'S NOT
10:14AM 21 CLEAR EXACTLY WHICH BOARD MEMBERS, AS I THINK MS. SAHARIA WILL
10:14AM 22 TELL YOU IN THE OTHER ARGUMENT ON DOCKET 498, BUT IT DOES ADD
10:15AM 23 BOARD MEMBERS. THEY'RE ALL QUITE SOPHISTICATED PARTIES WITH A
10:15AM 24 LONG HISTORY INVOLVED WITH THERANOS. IT ADDS A LOT OF
10:15AM 25 COMPLEXITY AND SIGNIFICANT ADDITION TO THE CASE.

1 AND THEN FINALLY, YOUR HONOR, THERE'S A NUMBER OF NEW
2 ASSAYS, OR BLOOD TESTS, THAT HAVE BEEN ADDED IN THE NEW
3 CHARGES. AND I CAN LIST THEM: CHOLESTEROL, GONORRHEA,
4 GLUCOSE, PSA, PTINR, TESTOSTERONE, TSH, AND FOUR OR FIVE
5 OTHERS.

6 THE REASON WHY THAT IS SIGNIFICANT, YOUR HONOR, IS THAT
7 EACH OF THESE BLOOD TESTS, OR ASSAYS AS THEY ARE CALLED, IS
8 INCREDIBLY A COMPLEX STORY IN AND OF ITSELF.

9 EVERY ASSAY THAT IS ADDED HERE INVOLVES QUITE A LOT OF
10 METICULOUS WORK ON BOTH SIDES, BUT ON THE DEFENSE SIDE IS WHAT
11 WE'RE TALKING ABOUT HERE, TO UNDERSTAND THE ASSAY, TO
12 UNDERSTAND WHAT HAPPENED, TO UNDERSTAND IF THERE'S ANY WAY IN
13 WHICH THE ASSAY CAN BE SYSTEMICALLY INACCURATE OR UNRELIABLE.
14 THAT ADDS QUITE A LOT OF BURDEN ON THE DEFENSE SIDE TO GO BACK
15 THROUGH THE DOCUMENTS AND TRY TO UNDERSTAND THOSE.

16 SO THOSE ARE THE FOUR WAYS. I KNOW THE GOVERNMENT, AGAIN,
17 ARGUES THAT THEIR CHARGES ARE MODEST OR THEIR MODIFICATIONS ARE
18 MODEST, BUT THEY'RE VERY EXPANSIVE AND VERY SIGNIFICANT.

19 THAT BRINGS US TO THE CORE OF THE ARGUMENT HERE WHICH,
20 YOUR HONOR, IS THE SO-CALLED BARKER VERSUS WINGO FACTORS FOR
21 SPEEDY TRIAL RIGHT UNDER SIXTH AMENDMENT.

22 SO THERE ARE FOUR FACTORS AS THE COURT HAS READ IN THE
23 PAPERS: DELAY OR THE AMOUNT OF DELAY, THE REASON FOR THE
24 DELAY, WHETHER THE DEFENDANT HAS INVOKED HIS SPEEDY TRIAL ACT
25 RIGHTS, AND THE PREJUDICE TO THE DEFENDANT.

1 LET ME TALK ABOUT DELAY FIRST. I DON'T NEED TO DWELL ON
2 THIS, BUT THERE'S BEEN QUITE A LONG TIME BETWEEN THE INITIAL
3 INDICTMENT, WHICH WAS OF COURSE IN JUNE OF 2018, AND THEN THE
4 SUPERSEDING INDICTMENTS THAT WERE IN JULY OF 2020.

5 NOW, OF COURSE WE UNDERSTAND THAT THE COVID CRISIS HIT THE
6 WORLD IN APPROXIMATELY MARCH I THINK WHEN THINGS STARTED TO
7 SHUT DOWN. SO EVEN IF YOU GIVE THE GOVERNMENT THE BENEFIT OF
8 THAT PERIOD BETWEEN MARCH AND JULY WHEN THE GRAND JURY WAS SHUT
9 DOWN AND THEN WAS BACK UP AGAIN IN JULY, STILL WE'RE TALKING
10 ABOUT A DELAY FROM JUNE 2018 THROUGH AT LEAST MARCH OF 2020.
11 IT'S ACTUALLY LONGER IF YOU COUNT THE PERIOD OF INVESTIGATION,
12 WHICH GOES BACK TO 2016 IN THIS CASE, ALL OF WHICH TIME
13 MR. BALWANI HAS BEEN LIVING WITH THIS CASE, YOU KNOW, SINCE HE
14 LEFT THERANOS IN 2016.

15 SO THE DELAY IS, IS MORE THAN WHAT IS REQUIRED FOR
16 INVOCATION OF THE SPEEDY TRIAL ACT -- I'M SORRY, THE SPEEDY
17 TRIAL CONSTITUTIONAL RIGHT UNDER THE SIXTH AMENDMENT. IT'S IN
18 THE BEST CASE SCENARIO SOMETHING LIKE 20 MONTHS AND IN OUR VIEW
19 LONGER.

20 THE COURT: SO LET ME ASK YOU, MR. COOPERSMITH, WHEN
21 COUNSEL AGREED EARLY ON IN A CASE, LET'S JUST SAY, THAT THE
22 CASE IS A COMPLEX ONE. AND THEY AGREE, THAT IS, THE GOVERNMENT
23 AND DEFENSE COUNSEL AGREE TO IDENTIFY A CASE USING THAT --
24 THAT'S A TERM OF ART, ISN'T IT, A COMPLEX CASE FOR OUR
25 PURPOSES? IT SUGGESTS THAT THIS IS NOT A RUN-OF-THE-MILL CASE,

10:18AM 1 YOUR HONOR. THIS IS A CASE THAT INVOLVES A VARIETY, NUMEROUS,
10:18AM 2 VOLUMINOUS DISCOVERY, DISCRETE ISSUES THAT WILL BE FLESHED OUT
10:18AM 3 IN MOTION PRACTICE, IT INVOLVES OTHER TECHNOLOGY THAT NEEDS TO
10:18AM 4 BE CAREFULLY EXAMINED. ALL OF THOSE FALL UNDER THE UMBRELLA OF
10:18AM 5 A COMPLEX CASE.

10:18AM 6 SO WHEN COUNSEL STIPULATE AND OTHERWISE AGREE TO THE COURT
10:18AM 7 THAT THE COURT SHOULD CONSIDER A CASE AS COMPLEX, DOESN'T THAT
10:18AM 8 IN AND OF ITSELF SUGGEST THAT THIS IS A SPECIAL, UNIQUE CASE
10:18AM 9 THAT IS GOING TO OCCUPY SIGNIFICANT AMOUNT OF THE COURT TIME,
10:18AM 10 NOT JUST IN THE PROCEEDINGS BUT ALSO IN THE LENGTH AND
10:18AM 11 DURATION, AND THE REASON THAT THERE IS AN AGREEMENT, IF THERE
10:18AM 12 IS ONE FOR COMPLEX CASES, IT GIVES ALL PARTIES NOTICE AS TO
10:19AM 13 EXPECTATIONS GOING FORWARD.

10:19AM 14 ISN'T THAT PART OF THE CALCULUS THAT SHOULD BE CONSIDERED
10:19AM 15 HERE?

10:19AM 16 MR. COOPERSMITH: YES, YOUR HONOR. THERE'S NO
10:19AM 17 QUESTION THAT THIS IS A COMPLEX CASE. AND THE PARTIES, OF
10:19AM 18 COURSE, BECAUSE OF THE NATURE OF IT, AGREE THAT THIS WAS A
10:19AM 19 COMPLEX CASE AS THE COURT SO FOUND.

10:19AM 20 SO, YES, THAT IS PART OF THE CALCULUS.

10:19AM 21 BUT THE COMPLEXITY OF THE CASE IS EXACTLY THE REASON WHY
10:19AM 22 THIS DELAY, THIS VERY LENGTHY DELAY IN BRINGING THE SUPERSEDING
10:19AM 23 CHARGES IS SUCH A PROBLEM.

10:19AM 24 SO WHEN YOU HAVE A COMPLEX CASE LIKE THIS WITH LITERALLY
10:19AM 25 TENS OF MILLIONS OF PAGES OF DISCOVERY THAT COUNSEL HAVE TO GO

10:19AM 1 THROUGH, WHAT HAPPENS IS THAT YOU LOOK AT THOSE DOCUMENTS AND
10:19AM 2 DEVELOP YOUR DEFENSE THEORIES AND ANY DEFENSE WITNESSES THAT
10:19AM 3 YOU'RE TRYING TO DEVELOP, YOU DO ALL OF THIS WITH AN EYE
10:19AM 4 TOWARDS WHAT THE CHARGES ACTUALLY ARE.

10:19AM 5 AND, YES, I UNDERSTAND THAT THERE ARE OTHER MOTION
10:19AM 6 PRACTICE PERHAPS ON 404(B) ISSUES, BUT YOU REALLY HAVE TO FOCUS
10:20AM 7 ON THE CHARGES.

10:20AM 8 WHEN THE GOVERNMENT DELAYS FOR A COUPLE OF YEARS AT LEAST
10:20AM 9 IN BRINGING CHARGES THAT ARE, AS I SAID, VASTLY EXPANDED IN AN
10:20AM 10 ALREADY COMPLEX CASE, IT CREATES AN ENORMOUS BURDEN AND
10:20AM 11 PREJUDICE TO A DEFENDANT LIKE MR. BALWANI, WHO AFTER ALL, DOES
10:20AM 12 NOT HAVE THE RESOURCES UNITED STATES GOVERNMENT. HE'S AN
10:20AM 13 INDIVIDUAL DEFENDANT, AND HE HAS GOT TO HAVE HIS COUNSEL GO
10:20AM 14 BACK THROUGH ALL OF THE MATERIAL.

10:20AM 15 AND I SHOULD POINT OUT, YOUR HONOR, THAT IS EXACTLY THE
10:20AM 16 PREJUDICE THAT JUDGE ILLSTON FOUND IN CUTTING. AT PAGE
10:20AM 17 STAR 11 OF HER OPINION SHE SAID THAT HAVING TO DO THAT AND THAT
10:20AM 18 KIND OF BURDEN.

10:20AM 19 SO I THINK, YOUR HONOR --

10:20AM 20 THE COURT: PARDON ME. CUTTING WAS INTERESTING.
10:20AM 21 JUDGE ILLSTON DID GRANT THAT MOTION ON ONE GROUND, BUT THEN
10:20AM 22 FOUND IT WAS RULE 48, I THINK. AND SHE ACTUALLY INDICATED TO
10:20AM 23 THE PARTIES THAT, WELL, I'M GOING TO PARSE OUT THESE OFFENDING
10:20AM 24 COUNTS, BUT YOU CAN REFILE THEM AND IN A NEW CHARGING DOCUMENT.

10:20AM 25 ULTIMATELY WHAT HAPPENED IN CUTTING IS THAT THAT'S EXACTLY

10:21AM 1 WHAT HAPPENED, AND THERE WAS A JOINT TRIAL AS I RECALL.

10:21AM 2 ISN'T THAT CORRECT?

10:21AM 3 MR. COOPERSMITH: YES, YOUR HONOR. THE PROCEDURAL
10:21AM 4 HISTORY IN CUTTING IS SOMEWHAT TORTURED.

10:21AM 5 THE COURT: IT IS.

10:21AM 6 MR. COOPERSMITH: WHAT WE'RE FOCUSSED --

10:21AM 7 THE COURT: WHAT WAS IMPORTANT -- I'M SORRY,
10:21AM 8 MR. COOPERSMITH.

10:21AM 9 BUT WHAT WAS IMPORTANT FOR ME TO GLEAN FROM CUTTING IS
10:21AM 10 THAT THE GOVERNMENT -- AND THAT WAS A COMPLEX CASE ALSO. IT
10:21AM 11 WAS BANK FRAUD. IT HAD MILLIONS AND MILLIONS OF PAGES OF
10:21AM 12 DOCUMENTS.

10:21AM 13 AND I THINK JUDGE ILLSTON, WITHOUT SO SPECIFICALLY
10:21AM 14 FINDING, BUT I THINK IT'S PRETTY CLEAR FROM ALL OF US THAT READ
10:21AM 15 CUTTING, HER OBSERVATION WAS THAT THE GOVERNMENT IN THAT CASE
10:21AM 16 WAS LESS THAN DILIGENT IN PROVIDING THE DISCOVERY.

10:21AM 17 I THINK THERE WAS AN INDICATION, WASN'T THERE, THAT THERE
10:21AM 18 WERE PROBABLY FIVE MORE BANKER'S BOXES REPRESENTED BY THE
10:21AM 19 GOVERNMENT, WHEN, IN FACT, THERE WERE ACTUALLY 23 OR MORE BOXES
10:21AM 20 THAT WERE GIVEN TO THE DEFENSE COUNSEL CLOSE IN TIME TO THE
10:21AM 21 TRIAL.

10:21AM 22 AND SHE FOUND THAT THAT WAS NOT -- JUST NOT, NOT FAIR AND
10:22AM 23 NOT APPROPRIATE.

10:22AM 24 SO I THINK THERE'S A BIT OF A DISTINCTION. THE QUALITIES
10:22AM 25 OF IT, THE ARGUMENT I THINK I DO CAPTURE, BUT I DO THINK

10:22AM 1 THERE'S A DISTINCTION BETWEEN THIS AND CUTTING. ALTHOUGH I
10:22AM 2 FOLLOW YOUR LOGIC AND JUDGE ILLSTON'S LOGIC ALSO IN FINDING AS
10:22AM 3 SHE DID.

10:22AM 4 MR. COOPERSMITH: YES, YOUR HONOR.

10:22AM 5 I THINK WHEN YOU COMPARE THIS CASE TO CUTTING AND, YES,
10:22AM 6 THERE WERE ANOTHER 23 BOXES THAT SHOWED UP IN DISCOVERY, I
10:22AM 7 THINK IN THIS CASE THE COURT, YOU KNOW, HAD ORDERED CERTAIN
10:22AM 8 DISCOVERY INVOLVING THE FDA AND CMS TO BE COMPLETED BY THE END
10:22AM 9 OF LAST YEAR, 2019.

10:22AM 10 WE'RE STILL -- LAST WEEK WE GOT MORE DISCOVERY THAT WAS
10:22AM 11 FROM DOCUMENTS THAT WERE 2016, 2017. THE GOVERNMENT, YOU KNOW,
10:22AM 12 TRIED -- TRIED TO GET AN EXTENSION. THEY NEVER ACTUALLY GOT
10:22AM 13 THE EXTENSION. THEY JUST KIND OF UNILATERALLY GOT AN
10:22AM 14 EXTENSION.

10:22AM 15 BUT THE DISCOVERY IS NOT JUST 23 BOXES THAT ROLLED IN LATE
10:22AM 16 HERE. I DON'T KNOW WHAT THE EQUIVALENT IS IN TERABYTES, BUT I
10:22AM 17 KNOW AT ONE POINT IN MAY WE GOT SOMETHING LIKE 1.7 TERABYTES.
10:23AM 18 SO I THINK IT WOULD PROBABLY FILL A WAREHOUSE. IT'S NOT JUST A
10:23AM 19 MATTER OF 23 BOXES.

10:23AM 20 BUT IN ADDITION, YOUR HONOR, THERE'S NO REASON FOR THE
10:23AM 21 DELAY. AND THIS IS SOMETHING THAT JUDGE ILLSTON FOUND VERY
10:23AM 22 SIGNIFICANT, AND OTHER COURTS HAVE AS WELL, IS THAT IN THE
10:23AM 23 GOVERNMENT'S OPPOSITION BRIEF THEY TALK A LOT ABOUT THE
10:23AM 24 COMPLEXITY OF THE CASE, AND THEY TALK A LOT ABOUT MOTION
10:23AM 25 PRACTICE AND COVID, BUT NOWHERE DO THEY EXPLAIN WHY THEY

1 COULDN'T HAVE BROUGHT THESE CHARGES RIGHT FROM THE GET-GO. WE
2 POINTED OUT IN OUR BRIEFING HOW THEY HAD ALL OF THE MATERIALS.

3 SO COMPLEX OR NOT, THEY COULD HAVE BROUGHT THESE CHARGES.
4 AS THE COURT HAS HELD IN THE DOGGETT CASE FROM THE SUPREME
5 COURT AND THE MENDOZA CASE, THE REASON FOR THE DELAY IS REALLY
6 THE FOCAL POINT HERE.

7 AND WHEN THE GOVERNMENT HAS NO REASON -- I JUST WANT TO
8 TELL YOUR HONOR THEY DO PUT FORWARD SOME REASONS, OR AT LEAST
9 TRY TO, ON PAGE 12 OF THEIR OPPOSITION. AND THEY SAY THE
10 FOLLOWING THREE THINGS: THE COMPLEXITY OF THE CASE AND THE
11 VOLUMINOUS DISCOVERY, THE EXTENSIVE MOTION PRACTICE, AND THEN
12 COVID-19. THEY ALSO TRY TO CLAIM THAT THERE WERE SOME
13 DISMISSALS. NONE OF THOSE REASONS, YOU KNOW, PASS MUSTER AT
14 ALL, YOUR HONOR.

15 THE COMPLEXITY OF THE CASE DOESN'T AFFECT WHETHER THE
16 GOVERNMENT COULD HAVE BROUGHT THESE CHARGES RIGHT FROM THE
17 BEGINNING. BUT THEY ACTUALLY ADMIT ON PAGE -- WHAT I BELIEVE
18 THEY ADMIT ON PAGE 12, THEY SAY THAT THEY REEVALUATED THE
19 CHARGING LANGUAGE AFTER THE COURT DISMISSED CERTAIN THEORIES
20 LAST YEAR.

21 NONE OF THE DISMISSALS IN THIS CASE HAVE ANYTHING TO DO
22 WITH THE NEW CHARGES.

23 WHAT THE COURT ACTUALLY DISMISSED, NOT COUNTS, BUT THE
24 COURT SAID PATIENTS WHO DIDN'T PAY FOR THERANOS'S TESTS -- AND
25 DOCTORS COULD NOT BE VICTIMS -- SO THE NEW CHARGES INVOLVING

10:24AM 1 WALGREENS AND SAFEWAY AND BOARD MEMBERS AND EXPANDING THE
10:24AM 2 TIMEFRAME AND THE NEW ASSAYS REALLY HAVE NOTHING AT ALL TO DO
10:24AM 3 WITH THOSE DISMISSALS.

10:24AM 4 SO FOR THE GOVERNMENT TO PUT THAT FORWARD JUST DOESN'T
10:24AM 5 MAKE ANY SENSE.

10:24AM 6 COVID-19 IS A FIG LEAF IN THIS MOTION, YOUR HONOR. THE
10:25AM 7 GOVERNMENT COULD HAVE -- YOU KNOW, THEY HAD A GRAND JURY
10:25AM 8 AVAILABLE TO THEM AT LEAST UNTIL MARCH, SO THERE'S STILL A
10:25AM 9 LENGTHY DELAY.

10:25AM 10 THE COMPLEXITY AND THE MOTION PRACTICE REALLY HAD NOTHING
10:25AM 11 TO DO WITH IT.

10:25AM 12 SO THE REASON FOR THE DELAY WAS AN IMPORTANT FACTOR FOR
10:25AM 13 JUDGE ILLSTON, AND I THINK IT SHOULD BE AN IMPORTANT FACTOR OR
10:25AM 14 A KEY FACTOR FOR THIS COURT.

10:25AM 15 AS I SAID, MR. BALWANI NOW HAS TO HAVE HIS COUNSEL NOW GO
10:25AM 16 BACK THROUGH MILLIONS OF PAGES. JUST AS JUDGE ILLSTON SAID
10:25AM 17 THIS IN CUTTING, WE HAVE TO GO LOOK AT MILLIONS OF PAGES AT AN
10:25AM 18 AMAZING EXPENSE AND A TERRIFIC EXPENSE TO MR. BALWANI TO TRY TO
10:25AM 19 ADDRESS THESE NEW CHARGES.

10:25AM 20 SO THE KEY --

10:25AM 21 THE COURT: I'M SORRY. MILLIONS OF PAGES TO ADDRESS
10:25AM 22 THE NEW CHARGES IN RELATION TO WHETHER OR NOT SAFEWAY AND
10:25AM 23 WALGREENS WERE INVESTORS?

10:25AM 24 MR. COOPERSMITH: IT'S NOT JUST WHETHER THEY WERE
10:25AM 25 INVESTORS. AND AS MS. SAHARIA WILL TELL YOU I THINK IN A

10:25AM 1 MINUTE, WE DON'T THINK THEY'RE INVESTORS IN THAT SENSE, BUT
10:25AM 2 GIVEN THAT THEY'RE NOW ALLEGED VICTIMS AND WE HAVE TO LOOK AT
10:25AM 3 WHAT ARE THE FALSE REPRESENTATIONS THAT WERE ALLEGEDLY MADE TO
10:26AM 4 NOT JUST ONE PERSON LIKE IN THE CASE OF AN INDIVIDUAL INVESTOR,
10:26AM 5 BUT AN ENTIRE GIANT CORPORATION THAT HAS SCORES OF PEOPLE
10:26AM 6 WORKING FOR IT.

10:26AM 7 SO WHO SAID WHAT TO WHO AND WHEN. AND THAT'S AN ENORMOUS
10:26AM 8 UNDERTAKING THAT WE NOW HAVE TO GO BACK THROUGH AND REALLY
10:26AM 9 FOCUS ON NOW THAT THE GOVERNMENT IS TRYING TO MAKE THAT PART OF
10:26AM 10 THE CHARGED CONDUCT.

10:26AM 11 THE COURT: IS THERE STILL THAT HERCULEAN TASK TO
10:26AM 12 DETERMINE WHICH BOARD MEMBERS WERE INVESTORS AND PURCHASED
10:26AM 13 EQUITY AS OPPOSED TO RECEIVING EQUITY AS COMPENSATION FOR THEIR
10:26AM 14 BOARD MEMBERSHIP?

10:26AM 15 MR. COOPERSMITH: THAT'S ANOTHER ISSUE FOR SURE,
10:26AM 16 YOUR HONOR.

10:26AM 17 THE COURT: IS THAT A HERCULEAN TASK AS WELL?

10:26AM 18 MR. COOPERSMITH: IT IS, YOUR HONOR. WE HAVE GOT TO
10:26AM 19 TRY TO FIGURE OUT WHO DID WHAT WHEN AND WHAT THEY WERE TOLD AND
10:26AM 20 WHAT BOARD MEETINGS. YOU KNOW, THERE'S MINUTES IN SOME CASES,
10:26AM 21 BUT SOMETIMES IT'S NOT CLEAR WHAT HAPPENED AT A BOARD MEETING.
10:26AM 22 I THINK THAT'S ANOTHER TASK. I DON'T THINK IT'S QUITE AS
10:26AM 23 HERCULEAN AS THE WALGREEN/SAFEWAY ISSUES AND THE ASSAY, THE
10:26AM 24 BLOOD TESTS.

10:26AM 25 THE COURT: IT SEEMS LIKE THAT CAN BE DETERMINED --

1 AND I'M KIND OF BLENDING OVER INTO THE OTHER MOTION AND I DON'T
2 MEAN TO -- BUT IT SEEMS LIKE THAT INFORMATION IS EASILY
3 OBTAINABLE, OR OBTAINABLE, LET ME PUT IT THAT WAY, FROM THE
4 STOCK LEDGER, AND YOU CAN DETERMINE WHO BOUGHT OR WHO RECEIVED
5 THIS COMPENSATION I SUPPOSE.

6 MAYBE I'M NAIVE ABOUT THAT, BUT IT SEEMS LIKE THAT WOULD
7 BE THE FIRST PLACE TO GO TO AND THAT WOULD PROVIDE SOME HELPFUL
8 INFORMATION.

9 MR. COOPERSMITH: YOUR HONOR, THE GOVERNMENT HASN'T
10 TOLD US EXACTLY WHAT THEIR THEORIES ARE ABOUT BOARD MEMBERS,
11 AND I THINK THE COURT IS RIGHT THAT YOU CAN DETERMINE WHO HAS
12 STOCK, WHETHER THEY GOT IT FROM PAYING MONEY OR EXERCISING
13 OPTIONS OR GETTING IT FOR EXCHANGE FOR SERVICES ON THE BOARD.

14 BUT THE MORE INTERESTING THING, AND THE MORE SIGNIFICANT
15 TASK, YOUR HONOR, IS TO TRY TO FIGURE OUT WHAT WERE THE
16 MISREPRESENTATIONS TO THE BOARD, WHAT DID THE BOARD KNOW FROM
17 BEING INSIDERS, WHAT ACCESS DID THEY HAVE. THOSE ARE THE
18 SIGNIFICANT EXPANSION AS IT RELATES TO BOARD MEMBERS.

19 BUT, YOU KNOW, AS I SAID BEFORE, THE SIGNIFICANT EXPANSION
20 IS NOT JUST ABOUT BOARD MEMBERS, IT'S ABOUT THESE GIANT RETAIL
21 CORPORATIONS, IT'S ABOUT ASSAYS, AND IT'S ABOUT THE EXPANSION
22 OF TIME FROM THREE TO SIX YEARS.

23 THE COURT: OKAY. AND THAT'S THE PREJUDICE THAT YOU
24 THINK IS -- I THINK THAT'S -- YOUR POINT IS THAT THE REAL
25 FACTOR THAT I SHOULD CONSIDER HERE IS WHAT IS THE PREJUDICE TO

10:28AM 1 YOUR CLIENT?

10:28AM 2 AND I THINK THIS IS WHAT IS YOU'RE INDICATING TO SUPPORT A
10:28AM 3 FINDING OF PREJUDICE AS TO YOUR CLIENT SUCH THAT THE COURT
10:28AM 4 SHOULD GRANT THE MOTION.

10:28AM 5 MR. COOPERSMITH: JUST TO CLARIFY, YOUR HONOR. THE
10:28AM 6 CASE LAW IS THAT WE DON'T ACTUALLY HAVE TO SHOW PREJUDICE.
10:28AM 7 THERE'S PRESUMED PREJUDICE.

10:28AM 8 AND IN THE SUPREME COURT'S DOGGETT OPINION IT SAID THAT IT
10:28AM 9 IS VERY DIFFICULT OFTEN TO SHOW PREJUDICE IN THESE CASES, AND
10:28AM 10 THAT'S WHY PREJUDICE IS PRESUMED. THAT SAID, YOUR HONOR, AS
10:28AM 11 I'VE ARTICULATED, I AGREE WITH YOU, THERE'S SIGNIFICANT
10:28AM 12 PREJUDICE, AND WE'VE LAID THAT OUT FOR THE COURT.

10:28AM 13 BUT AS JUDGE ILLSTON SAID, THE OTHER FACTOR IS THE REASON
10:28AM 14 FOR THE DELAY HERE, AND THE GOVERNMENT JUST DOESN'T HAVE ANY
10:28AM 15 VALID REASON GIVEN ALL OF THE INFORMATION THAT THEY HAD
10:28AM 16 AVAILABLE TO IT AS TO WALGREENS, SAFEWAY, AND THESE OTHER
10:28AM 17 EXPANDED CHARGES.

10:28AM 18 SO I THINK THE FOCAL POINT, AS THE COURTS HAVE SAID, IS
10:29AM 19 THE REASON FOR THE DELAY. I THINK THERE'S ALSO PREJUDICE HERE,
10:29AM 20 EVEN THOUGH WE DON'T HAVE TO SHOW IT, VERY SIGNIFICANT PROFOUND
10:29AM 21 PREJUDICE, AND FOR THOSE REASONS I THINK THE COURT SHOULD GRANT
10:29AM 22 OUR MOTION TO DISMISS ON SIXTH AMENDMENT GROUNDS.

10:29AM 23 THE COURT: OKAY. THANK YOU.

10:29AM 24 I THINK DOGGETT AND THOSE OTHER CASES SUGGEST THAT
10:29AM 25 CONTINUANCES BEYOND A YEAR AND OTHER DATES AS PRESUMPTIVE

1 PREJUDICE, THAT'S THE START THAT YOU LOOK AT.

2 AND YOU SAY, WELL, GEE, IT HASN'T GONE TO TRIAL IN THIS
3 TIME, AND THERE MUST BE SOMETHING WRONG. WE ALSO -- THE
4 FACTORS, YOU KNOW, WE LOOK AT WHETHER YOUR CLIENT IS IN CUSTODY
5 AND THOSE TYPES OF THINGS.

6 BUT THANK YOU. YOU'VE BEEN VERY HELPFUL IN THAT.

7 SO, MR. LEACH, ARE YOU SPEAKING TO THIS? YES, THERE YOU
8 ARE.

9 MR. LEACH: I AM, YOUR HONOR. THANK YOU VERY MUCH.
10 AND GOOD MORNING.

11 I THINK AS THE COURT IS CONSIDERING THIS MOTION IT'S
12 IMPORTANT TO THINK ABOUT WHAT IS NOT ALLEGED. THERE'S NO
13 ALLEGATION OF A SIXTH AMENDMENT PROBLEM WITH A TRIAL ON THE
14 FIRST SUPERSEDING INDICTMENT.

15 SO FOR THE TIME PERIOD FROM WHEN THE INDICTMENT WAS FILED
16 UNTIL MARCH OF 2021, NO PROBLEM UNDER THE SPEEDY TRIAL AND THE
17 SIXTH AMENDMENT CLAUSE UNDER THE DEFENDANTS' THEORY.

18 THERE'S ALSO NO ALLEGATION OF A SPEEDY TRIAL ACT
19 VIOLATION, AND THIS IS IMPORTANT BECAUSE THE NINTH CIRCUIT HAS
20 REPEATEDLY SAID THAT THE SPEEDY TRIAL ACT AFFORDS GREATER
21 PROTECTION FOR THE DEFENDANT, THE GOVERNMENT'S RIGHT TO A
22 SPEEDY TRIAL THAN WHAT IS GUARANTEED UNDER THE SIXTH AMENDMENT.

23 AND THE NINTH CIRCUIT HAS SAID IT WILL BE AN USUAL CASE IN
24 WHICH THE TIME LIMITS OF THE SPEEDY TRIAL ACT HAVE BEEN MET,
25 BUT THERE'S A SIXTH AMENDMENT CONSTITUTIONAL PROBLEM UNDER THE

10:30AM 1 SPEEDY TRIAL.

10:30AM 2 THE PROBLEM THAT THEY CLAIM IS THAT NOW WE HAVE TO DEFEND
10:30AM 3 AGAINST ALLEGATIONS RELATING TO WALGREENS, AND, THEREFORE, MY
10:30AM 4 SPEEDY TRIAL RIGHTS ARE VIOLATED.

10:30AM 5 THIS IS WRONG FOR SEVERAL REASONS, YOUR HONOR, AND I WANT
10:31AM 6 TO FOCUS IN ON BOTH THE PREJUDICE AND THE GOVERNMENT'S REASONS
10:31AM 7 FOR SUPERSEDING.

10:31AM 8 THERE IS NO PREJUDICE HERE. MR. COOPERSMITH HASN'T
10:31AM 9 POINTED TO A SINGLE DOCUMENT PRODUCED BY WALGREENS OR SAFEWAY
10:31AM 10 OR A BOARD MEMBER THAT THEY HAVE NOT HAD FOR YEARS.

10:31AM 11 THE GOVERNMENT'S INITIAL PRODUCTION OF DISCOVERY INCLUDED
10:31AM 12 EVIDENCE RELATED TO WALGREENS. IT INCLUDED EVIDENCE RELATED TO
10:31AM 13 SAFEWAY, AND IT INCLUDED EVIDENCE RELATING TO THE BOARD
10:31AM 14 MEMBERS. AND THERE CAN BE NO CLAIM OR SURPRISE ABOUT THE
10:31AM 15 GOVERNMENT'S INTENTION TO USE THIS EVIDENCE IN A TRIAL AGAINST
10:31AM 16 MS. HOLMES AND MR. BALWANI.

10:31AM 17 THEY TALK ABOUT MILLIONS OF DOCUMENTS, BUT THEY HAVEN'T
10:31AM 18 POINTED TO A DOCUMENT PRODUCED BY WALGREENS OR SAFEWAY OR THE
10:31AM 19 BOARD THAT THEY HAVE TO REREVIEW, A WITNESS THAT THEY HAVE TO
10:31AM 20 REINTERVIEW, OR SOME PIVOT THAT THEY HAVE TO MAKE FOR THE TRIAL
10:32AM 21 THAT WAS ALREADY COMING.

10:32AM 22 THE INDICTMENT FROM DAY ONE HAS ALLEGED THAT THERANOS
10:32AM 23 PURSUED A RELATIONSHIP WITH WALGREENS. THE WALGREENS
10:32AM 24 RELATIONSHIP WAS ALWAYS PART OF THIS CASE.

10:32AM 25 WALGREENS WITNESSES ARE LISTED IN THE GOVERNMENT'S WITNESS

1 LIST, AND WE GAVE THEM VERY SPECIFIC NOTICE IN MARCH OF 2020,
2 WHICH IS NOW A YEAR FROM OUR TRIAL DATE WHERE WE TOLD THEM WE
3 INTEND TO OFFER EVIDENCE RELATING TO WALGREENS, WE INTEND TO
4 INTRODUCE EVIDENCE RELATING TO SAFEWAY UNDER THE EXISTING
5 INDICTMENT.

6 SO FROM OUR PERSPECTIVE NOTHING HAS CHANGED. THE INITIAL
7 INDICTMENT SPECIFICALLY ALLEGED THAT THERANOS PURSUED A
8 RELATIONSHIP WITH WALGREENS. WE HAVE PRODUCED THIS DISCOVERY.
9 THEY'VE -- YOU KNOW, TO THE EXTENT THAT THERE WAS SOME DOUBT
10 ABOUT OUR INTENTION TO INTRODUCE THIS EVIDENCE, THEY'VE KNOWN
11 SINCE MARCH OF 2020.

12 AND IN TERMS OF WHY THE GOVERNMENT SUPERSEDED THE
13 INDICTMENT, TO BE COMPLETELY TRANSPARENT, WHEN WE STARTED TO
14 SEE WHERE THE DEFENSE WAS GOING TO TRY TO CUT OFF WHAT WE HAVE
15 PERCEIVED FROM DAY ONE AS EXTRAORDINARILY RELEVANT EVIDENCE,
16 EVIDENCE THAT WE THOUGHT WE HAD CHARGED, BUT AT A MINIMUM IS
17 INEXTRICABLY INTERTWINED WITH EVERYTHING THAT THE DEFENDANTS
18 DID, WE WENT BACK TO THE GRAND JURY AND WE SUPERSEDED TO MAKE
19 IT CLEAR THAT FROM DAY ONE THIS WAS PART OF THE CASE.

20 SO I JUST DON'T THINK THAT THEY HAVE IDENTIFIED ANY
21 PREJUDICE. I THINK THE COURT'S FOCUS ON THE TORTURED HISTORY
22 OF CUTTING IS CORRECT.

23 I HEARD MR. COOPERSMITH BRING UP SOME OF THE FDA DOCUMENTS
24 AND THE FDA PRODUCTION. AS AN INITIAL MATTER, WE PRODUCED WHAT
25 THEY ARE TALKING ABOUT MONTHS AGO AND SO -- BUT MORE

10:34AM 1 IMPORTANTLY, I DON'T THINK THEY'VE TIED THIS TO ANYTHING THAT
10:34AM 2 IS NEW IN THE THIRD SUPERSEDING INDICTMENT.

10:34AM 3 THE FDA DOCUMENTS DON'T TIE TO WHAT HAPPENED WITH
10:34AM 4 WALGREENS AND WITH WHAT HAPPENED WITH SAFEWAY AND WITH WHAT
10:34AM 5 HAPPENED TO THE BOARD MEMBERS.

10:34AM 6 FINALLY, JUST TO TOUCH ON HOW THIS PREJUDICE FACTOR FITS
10:34AM 7 IN. YOU KNOW, THE COURTS HAVE SAID, AND I THINK DOGGETT SAYS
10:34AM 8 THAT IF THERE'S A DELAY BETWEEN THE INDICTMENTS AND THE TRIAL
10:34AM 9 OF MORE THAN A YEAR, THAT IS SUFFICIENT TO TRIGGER SOME FORM OF
10:34AM 10 INQUIRY ABOUT PREJUDICE AND TRIGGERING OF THE FOUR BARKER
10:34AM 11 FACTORS, BUT PREJUDICE IS STILL A PROMINENT FACTOR. THEY CAN'T
10:34AM 12 MEET IT HERE.

10:34AM 13 AND I THINK IF YOU LOOK CLOSELY AT THE CASES THAT THEY
10:34AM 14 HAVE CITED, IF YOU LOOK AT DOGGETT, WHICH INVOLVES, YOU KNOW,
10:34AM 15 THE GOVERNMENT'S FAILURE TO TRACK DOWN A U.S. CITIZEN WHO IS
10:34AM 16 HERE IN THE UNITED STATES FOR OVER EIGHT YEARS. IF YOU LOOK AT
10:35AM 17 THE KING CASE OR THE OTHER CASES THAT THEY HAVE CITED WHICH
10:35AM 18 INVOLVE VERY LENGTHY DELAYS OR DELAYS IN EVEN BRINGING THE
10:35AM 19 DEFENDANT TO THE COURT, NONE OF THEM REALLY FIT IN THE MOLD OF
10:35AM 20 WHAT THEY'RE TRYING TO DO HERE, WHICH IS TO SAY THAT I CAN BE
10:35AM 21 READY FOR TRIAL IN MARCH UNDER THE FIRST SUPERSEDING
10:35AM 22 INDICTMENT.

10:35AM 23 THEY HAVEN'T EVEN SAID THAT THEY CAN'T BE READY IN MARCH
10:35AM 24 UNDER THE THIRD SUPERSEDING INDICTMENT. BUT SOMEHOW UNDER THE
10:35AM 25 EXISTING CASE SCHEDULE, THE TIMING OF WHEN THIS CAME CAUSES A

10:35AM 1 SPEEDY TRIAL VIOLATION, A DELAY IN MY RIGHTS TO MY DAY IN
10:35AM 2 COURT. THEY'RE JUST NOT SAYING THAT, AND THEY DON'T HAVE A
10:35AM 3 CASE TO FIT THIS INTO.

10:35AM 4 SO FOR ALL OF THESE REASONS WE THINK THE COURT SHOULD DENY
10:35AM 5 THIS MOTION. THE DEFENDANT'S SPEEDY TRIAL RIGHTS HAVE NOT BEEN
10:35AM 6 VIOLATED.

10:35AM 7 THE COURT: THANK YOU, MR. LEACH.

10:35AM 8 YOU'VE MENTIONED THE WORD "CLARITY" AND THAT'S GOING TO
10:35AM 9 COME UP IN THE DISCUSSION OF SOME OF THE OTHER MOTIONS HERE
10:35AM 10 BECAUSE I DO HAVE SOME QUESTIONS ABOUT THAT.

10:35AM 11 LET ME SEE, LET ME JUST TURN -- I KNOW THAT MS. HOLMES HAS
10:36AM 12 JOINED THIS MOTION.

10:36AM 13 LET'S SEE. WHO WAS GOING TO SPEAK TO THAT? MS. SAHARIA,
10:36AM 14 WERE YOU GOING TO ADD ANYTHING OR DO YOU WISH -- DOES YOUR TEAM
10:36AM 15 WISH TO ADD ANYTHING TO THE CONVERSATION?

10:36AM 16 MS. SAHARIA: YOUR HONOR, I'M HAPPY TO RELY ON
10:36AM 17 MR. COOPERSMITH'S ARGUMENT FOR THIS ONE.

10:36AM 18 I DO HAVE SOME THOUGHTS ABOUT THE WAYS IN WHICH THE
10:36AM 19 GOVERNMENT DID BROADEN THE INDICTMENT, BUT I'M HAPPY TO LEAVE
10:36AM 20 THAT FOR THE STATUTE OF LIMITATIONS ARGUMENT, WHICH I'LL BE
10:36AM 21 HANDLING.

10:36AM 22 THE COURT: ALL RIGHT. THANK YOU. I'M SURE
10:36AM 23 MR. COOPERSMITH APPRECIATES YOUR CONFIDENCE. THANK YOU.

10:36AM 24 MR. COOPERSMITH, ANYTHING FURTHER IN CLOSING?

10:36AM 25 MR. COOPERSMITH: YES, YOUR HONOR. AND I DO

1 APPRECIATE MS. SAHARIA'S CONFIDENCE.

2 SO, YES, YOUR HONOR. FIRST OF ALL, JUST REAL BRIEFLY,
3 MR. LEACH TALKED ABOUT THE SPEEDY TRIAL ACT, AND WE HAVE NOT
4 BASED OUR MOTION ON THE SPEEDY TRIAL ACT.

5 BUT JUST AS JUDGE ILLSTON IN CUTTING REMARKED, WHEN
6 THERE'S DOCUMENTS OF THE VOLUME HERE AND THEY'RE STILL ROLLING
7 IN, YOU KNOW, AS LATE AS LAST WEEK AND PROBABLY STILL ROLLING
8 IN, I MEAN, WE REALLY DIDN'T HAVE ANY OPTION OTHER THAN TO, YOU
9 KNOW, AGREE TO SPEEDY TRIAL ACT WAIVERS AND SO FORTH.

10 SO THAT'S REALLY A NEUTRAL FACTOR AND JUDGE ILLSTON SO
11 FOUND IN CUTTING.

12 SECOND, YOUR HONOR, THIS POINT THAT MR. LEACH MAKES ABOUT
13 HOW WE'VE HAD DOCUMENTS FOR YEARS INVOLVING WALGREENS AND
14 SAFEWAY AND OTHER MATTERS, THAT'S A VERY INTERESTING THING
15 BECAUSE THAT'S NOT THE WAY CRIMINAL PROSECUTION WORKS.

16 THE GOVERNMENT ALSO HAD THOSE DOCUMENTS. IN FACT, THEY
17 HAD THE DOCUMENTS LONG BEFORE WE HAD THEM BECAUSE THEY HAD
18 GRAND JURY SUBPOENA POWER AND THEY STARTED THEIR INVESTIGATION
19 IN 2016.

20 AND WHEN -- IT'S NOT OUR JOB, NOR COULD WE EVEN REALLY DO
21 THIS, TO COMB THROUGH THE DISCOVERY WITH AN EYE TOWARDS WHAT
22 ELSE COULD THE GOVERNMENT HAVE CHARGED?

23 AND, YOU KNOW, MS. SAHARIA IS GOING TO ADDRESS THIS IN A
24 MINUTE I BELIEVE, BUT IT'S JUST NOT TRUE, IT'S JUST NOT TRUE
25 THAT THESE ARE JUST CONFIRMING CHARGES THAT HAD ALREADY BEEN

10:38AM 1 THERE. THESE ARE GREATLY EXPANDED CHARGES AS I'VE LAID OUT AND
10:38AM 2 I THINK MS. SAHARIA WILL.

10:38AM 3 SO I DON'T THINK THAT IT'S APPROPRIATE TO SAY THAT THE
10:38AM 4 GOVERNMENT CAN BE EXCUSED FOR THE DELAY BECAUSE THEY PRODUCED A
10:38AM 5 BUNCH OF DISCOVERY AND THE DEFENSE COULD HAVE SOMEHOW DISCERNED
10:38AM 6 WHAT ELSE THE GOVERNMENT COULD HAVE CHARGED.

10:38AM 7 AND THEN, YOUR HONOR, FINALLY, ON THE CUTTING POINT. AS I
10:38AM 8 SAID, I DO AGREE, AND I THINK EVERYONE AGREES, THAT THERE'S A
10:38AM 9 TORTURED HISTORY WITH CUTTING.

10:38AM 10 IT IS TRUE THAT ALTHOUGH JUDGE ILLSTON FOUND A VIOLATION
10:38AM 11 OF THE SIXTH AMENDMENT IN HER OPINION, LATER ON, ON THE
10:38AM 12 GOVERNMENT'S MOTION FOR RECONSIDERATION SHE CHANGED THAT TO A
10:38AM 13 RULE 48(B) GROUND AND THE GOVERNMENT WAS ALLOWED TO REBRING THE
10:38AM 14 CHARGES.

10:38AM 15 JUST TO BE CANDID, YOUR HONOR, I DON'T REALLY SEE THAT
10:38AM 16 THAT MAKES ANY SENSE. I THINK EVERY CASE IS DIFFERENT AND
10:38AM 17 THERE'S PROBABLY A LOT OF NUANCES TO CUTTING THAT WE'RE NOT
10:38AM 18 GETTING FROM THE DOCUMENTS, BUT IN THIS CASE IF IT IS TRUE AS
10:38AM 19 WE SAY THAT THE GOVERNMENT WAITED TOO LONG TO BRING THE GREATLY
10:39AM 20 EXPANDED CHARGES, THEN OUR POSITION IS THAT THE SUPERSEDING
10:39AM 21 INDICTMENTS, THE SECOND AND THIRD, SHOULD BE DISMISSED WITH
10:39AM 22 PREJUDICE.

10:39AM 23 I'M NOT GOING TO SAY THAT JUDGE ILLSTON GOT IT WRONG. I
10:39AM 24 THINK I PROBABLY DON'T KNOW ENOUGH ABOUT WHAT THE NUANCES OF
10:39AM 25 THOSE CASES WERE. BUT WHETHER IT'S UNDER RULE 48(B), WHICH IS

1 CERTAINLY AN OPTION FOR THE COURT, OR UNDER THE SIXTH
2 AMENDMENT, THE APPROPRIATE REMEDY IS TO DISMISS THE SECOND AND
3 THIRD SUPERSEDING INDICTMENT, TO LET THE CASE PROCEED ON ONLY
4 THE FIRST SUPERSEDING INDICTMENT IF IT OTHERWISE SURVIVES GIVEN
5 THE OTHER MOTIONS.

6 SO THANK YOU, YOUR HONOR.

7 THE COURT: THANK YOU VERY MUCH, MR. COOPERSMITH.

8 AND LET ME INDICATE I'M GOING TO -- IT'S MY INTENT AFTER
9 HEARING YOUR COMMENTS THIS MORNING TO TAKE EACH OF THESE
10 MOTIONS UNDER SUBMISSION AND GET ORDERS OUT TO YOU AS PROMPTLY
11 AS I CAN. I JUST WANT TO YOU KNOW THAT.

12 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

13 THE COURT: YOU'RE WELCOME.

14 LET'S TURN TO 498, PLEASE. I THINK THERE ARE SOME -- THIS
15 IS THE PRE-INDICTMENT DELAY. I THINK THERE'S SOME OVERLAP HERE
16 TO THE ARGUMENTS, AND PERHAPS WE CAN DISCUSS THIS ONE NEXT.

17 LET'S SEE. WHO IS GOING TO PRESENT THIS ARGUMENT FOR THE
18 MOVING PARTY?

19 MS. SAHARIA: I AM, YOUR HONOR. THIS IS
20 AMY SAHARIA.

21 THE COURT: ALL RIGHT. THANK YOU. THIS IS
22 MS. HOLMES'S MOTION, AND THIS IS DOCKET 498.

23 MR. BALWANI JOINS IN 503; THE GOVERNMENT OPPOSITION IS
24 518; AND MS. HOLMES'S REPLY IS 543.

25 MS. SAHARIA.

10:40AM 1 MS. SAHARIA: THANK YOU. THIS IS A MOTION TO
10:40AM 2 DISMISS COUNTS THROUGH THREE THROUGH EIGHT AND THEN TEN AND
10:40AM 3 ELEVEN AS TIME BARRED UNDER THE STATUTE OF LIMITATIONS.

10:40AM 4 AND IT PRESENTS TWO DISTINCT ISSUES. I THINK THE FIRST OF
10:40AM 5 WHICH IS MOST ALIGNED WITH YOUR CONVERSATION JUST NOW WITH
10:40AM 6 MR. COOPERSMITH. SO LET ME START WITH, WITH THE FIRST ISSUE,
10:40AM 7 AND THAT RELATES TO COUNTS THREE THROUGH EIGHT.

10:40AM 8 COUNTS THREE THROUGH EIGHT CHARGE WIRE FRAUD IN
10:41AM 9 FURTHERANCE OF THE ALLEGED SCHEME TO DEFRAUD INVESTORS, AND
10:41AM 10 THEY'RE BASED ON WIRES THAT OCCURRED IN 2013 AND 2014, SO MORE
10:41AM 11 THAN FIVE YEARS BEFORE THE CURRENT INDICTMENTS.

10:41AM 12 THE RELEVANT QUESTION, WE ALL AGREE, IS WHETHER THE
10:41AM 13 CURRENT COUNTS RELATE BACK TO THE PRIOR ONES FROM THE PRIOR
10:41AM 14 INDICTMENT.

10:41AM 15 WE ALL AGREE, I THINK, ON WHAT THE LEGAL PRINCIPLE IS,
10:41AM 16 WHICH IS THAT A SUPERSEDING INDICTMENT RELATES BACK ONLY IF IT
10:41AM 17 DOES NOT MATERIALLY BROADEN OR SUBSTANTIALLY AMEND THE ORIGINAL
10:41AM 18 CHARGES. SO THE DISPUTE BETWEEN THE PARTIES IS HOW TO APPLY
10:41AM 19 THAT PRINCIPLE HERE.

10:41AM 20 I THINK THAT RAISES TWO QUESTIONS. THE FIRST IS THE ONE
10:41AM 21 THAT YOUR HONOR WAS JUST DISCUSSING WITH MR. COOPERSMITH AND
10:41AM 22 MR. LEACH, WHICH IS DOES THE -- DOES THIS, THE NEW INDICTMENT,
10:41AM 23 MATERIALLY BROADEN THE ALLEGED SCHEME TO DEFRAUD INVESTORS?
10:41AM 24 AND WE BELIEVE IT DOES IN TWO DISTINCT WAYS.

10:41AM 25 THE FIRST I THINK IS A RELATIVELY OBVIOUS ONE, WHICH IS

10:42AM 1 THAT THE GOVERNMENT HAS DOUBLED THE LENGTH OF THAT CHARGE
10:42AM 2 SCHEME TO DEFRAUD. THE ORIGINAL SCHEME TO DEFRAUD LASTED
10:42AM 3 THREE YEARS AND THE GOVERNMENT HAS NOW BROUGHT THAT BACK THREE
10:42AM 4 MORE YEARS ALL OF THE WAY TO 2010 SUCH THAT THE DEFENDANTS ARE
10:42AM 5 NOW FACING CHARGES FOR THE FIRST TIME FOR THINGS THAT OCCURRED
10:42AM 6 TEN YEARS AGO. THAT'S THE FIRST WAY IN WHICH THAT SCHEME HAS
10:42AM 7 BEEN EXPANDED.

10:42AM 8 THE SECOND WAY IN WHICH THE SCHEME HAS BEEN EXPANDED IS
10:42AM 9 THROUGH THE GOVERNMENT'S REDEFINITION OF THE TERM "INVESTOR."

10:42AM 10 AND THERE ARE SOME QUESTIONS AS TO WHETHER THAT IS A
10:42AM 11 PERMISSIBLE DEFINITION. THAT GOES TO OUR DUPLICITY MOTION
10:42AM 12 WHICH MY COLLEAGUE, MR. LEMENS, IS GOING TO DISCUSS. THERE ARE
10:42AM 13 ALSO SOME QUESTIONS AS TO WHAT EXACTLY THE DEFINITION MEANS
10:42AM 14 PARTICULARLY WITH RESPECT TO THE BOARD MEMBERS, AND MR. LEMENS
10:42AM 15 WILL DISCUSS THAT AS WELL.

10:42AM 16 BUT TAKING THE DEFINITION ON ITS FACE, WE THINK IT'S CLEAR
10:42AM 17 THAT THE GOVERNMENT HAS EXPANDED THE DEFINITION OF "INVESTOR"
10:43AM 18 AND IN PARTICULAR BY SWEEPING IN WALGREENS AND SAFEWAY.

10:43AM 19 NOW, MR. LEACH'S RESPONSE TO THAT WAS TO SAY THAT
10:43AM 20 WALGREENS AND SAFEWAY WERE ALWAYS PART OF THE INDICTMENT EVEN
10:43AM 21 BACK IN THE ORIGINAL INDICTMENT, AND WE JUST DON'T THINK THAT
10:43AM 22 IS A CREDIBLE READING OF THE INDICTMENT OR THE PARTIES' PRIOR
10:43AM 23 REPRESENTATIONS TO THE COURT. THE INDICTMENT CHARGED THE
10:43AM 24 DEFENDANTS WITH DEFRAUDING INVESTORS ABOUT BUSINESS PRODUCTS
10:43AM 25 AND DISTINGUISHING BETWEEN THOSE TWO CATEGORIES OF ENTITIES.

10:43AM 1 THE COURT: SO, MS. SAHARIA, PARDON ME FOR
10:43AM 2 INTERRUPTING YOU. I RECOGNIZE THAT YOU SUGGEST THAT THERE'S A
10:43AM 3 DISTINCTION. I GUESS THE QUESTION WE SOMETIMES HEAR IS, IS
10:43AM 4 THERE? CAN'T AN INVESTOR BE A BUSINESS PARTNER? AND IF YOU'RE
10:43AM 5 A BUSINESS PARTNER, ARE YOU THEN EXCLUDED FROM BEING AN
10:43AM 6 INVESTOR?

10:44AM 7 AND MAYBE, AS YOU SUGGEST, THIS MIGHT COME UP IN THE OTHER
10:44AM 8 MOTION.

10:44AM 9 MS. SAHARIA: I THINK IT WILL COME UP IN THE OTHER
10:44AM 10 MOTION.

10:44AM 11 BUT I DON'T WANT TO TACKLE HERE THE QUESTION OF WHETHER A
10:44AM 12 BUSINESS PARTNER COULD BE AN INVESTOR BECAUSE MY COLLEAGUE,
10:44AM 13 MR. LEMENS, WILL DISCUSS THAT IN THE CONTEXT OF DUPLICITY.

10:44AM 14 WHAT I AM FOCUSSED ON IS WHETHER IN LIGHT OF EVERYTHING
10:44AM 15 THAT THE PARTIES PREVIOUSLY TOLD THE COURT, DID THE PARTIES
10:44AM 16 PREVIOUSLY UNDERSTAND THAT WALGREENS AND SAFEWAY WERE PART OF
10:44AM 17 THE INDICTMENT FROM THE GET-GO? AND I THINK THERE ARE SEVERAL
10:44AM 18 CLUES THAT WE DID NOT UNDERSTAND WALGREENS AND SAFEWAY TO BE
10:44AM 19 PART OF THE INDICTMENT AND NEITHER DID THE GOVERNMENT.

10:44AM 20 SO ONE CLUE IS THE FACT THAT THE INDICTMENT REFERS TO
10:44AM 21 INVESTORS SEPARATELY FROM WALGREENS AS A BUSINESS PARTNER.

10:44AM 22 ANOTHER CLUE IS THE TIME PERIOD THAT WAS ORIGINALLY
10:44AM 23 CHARGED IN THE INDICTMENT, WHICH WAS 2013 TO 2015. WHEN YOU
10:45AM 24 LOOK AT THE INVESTMENTS THAT THE GOVERNMENT CLAIMS, LET'S SAY
10:45AM 25 SAFEWAY MADE, THOSE INVESTMENTS ALL PREDATED 2013, MEANING THAT

10:45AM 1 WE DID NOT UNDERSTAND SAFEWAY TO BE ONE OF THE INVESTORS AT
10:45AM 2 ISSUE IN THE PRIOR INDICTMENT, AND THAT SUGGESTS THE WHOLE
10:45AM 3 REASON WHY THE GOVERNMENT EXPANDED THE TIME PERIOD WAS
10:45AM 4 PRECISELY SO THAT IT COULD CAPTURE WALGREENS AND SAFEWAY INTO
10:45AM 5 ITS DEFINITION OF INVESTOR WHEN IT WASN'T PREVIOUSLY PART OF
10:45AM 6 THAT DEFINITION.

10:45AM 7 THE COURT: I THINK WHAT YOUR ARGUMENT WAS, WAS THAT
10:45AM 8 THE GOVERNMENT HAS DONE THIS TO SOMEHOW ESCAPE THE CORRAL OF
10:45AM 9 THE STATUTE OF LIMITATIONS.

10:45AM 10 MS. SAHARIA: I THINK THAT IS ONE VERY PLAUSIBLE
10:45AM 11 EXPLANATION FOR WHY WALGREENS AND SAFEWAY ARE NOW KIND OF
10:45AM 12 SMUSHED INTO THE PREVIOUS DEFINITION OF "INVESTOR," BECAUSE IF
10:45AM 13 THEY HAD CHARGED A NEW COUNT FOCUSING JUST ON WALGREENS AND
10:46AM 14 SAFEWAY, WE BELIEVE WE WOULD HAVE A VERY STRONG STATUTE OF
10:46AM 15 LIMITATIONS DEFENSE.

10:46AM 16 THE COURT: YOU KEEP USING THESE TERMS OF ART,
10:46AM 17 MS. SAHARIA. "SMUSHED" IS ANOTHER TERM.

10:46AM 18 MS. SAHARIA: THAT'S NOT A TERM OF ART, BUT I THINK
10:46AM 19 IT CAPTURES WHAT HAS HAPPENED HERE, YOUR HONOR.

10:46AM 20 THE COURT: OKAY.

10:46AM 21 MS. SAHARIA: ANOTHER CLUE IS THE 404(B) NOTICE.
10:46AM 22 THE 404(B) NOTICE THAT THE GOVERNMENT SERVED IN MARCH EXPRESSLY
10:46AM 23 INCLUDED ALLEGATIONS THAT DEFENDANTS MADE MISREPRESENTATIONS TO
10:46AM 24 WALGREENS AND SAFEWAY.

10:46AM 25 ALTHOUGH IT CLAIMED THAT THOSE REPRESENTATIONS MIGHT BE

1 INEXTRICABLY INTERTWINED WITH THE CHARGED CONDUCT, DID NOT
2 ARGUE THAT THEY WERE ACTUALLY THE CHARGED CONDUCT. AND, IN
3 FACT, WHEN WE WERE BEFORE THE COURT THE LAST TIME AND I TOLD
4 THE COURT THAT THE EFFECT OF THE NEW INDICTMENTS WAS TO MOVE
5 ALLEGATIONS FROM THE RULE 404(B) NOTICE AND PUT THEM INTO THE
6 NEW INDICTMENT, GOVERNMENT COUNSEL AGREED WITH ME ABOUT THE
7 EFFECT OF THE NEW INDICTMENT.

8 SO WE JUST DON'T THINK THAT IT'S CREDIBLE TO SAY THAT THE
9 NEW INDICTMENT IS JUST CHARGING WHAT HAS BEEN CHARGED ALL
10 ALONG. SO THAT'S THE FIRST ISSUE AS TO THE FIRST ISSUE GOING
11 TO THE STATUTE OF LIMITATIONS ARGUMENT, WHICH IS THAT THE
12 SCHEME TO DEFRAUD HAS BEEN EXPANDED.

13 NOW, THE SECOND ISSUE IS THE GOVERNMENT'S RESPONSE TO THAT
14 IS, WELL, THE WIRES ARE THE SAME. SO THEY POINT OUT THAT
15 COUNTS THREE THROUGH EIGHT CHARGE THE EXACT SAME WIRINGS, THOSE
16 WIRINGS OCCURRING IN 2013 AND 2014. AND THEY SAY, THEREFORE,
17 THOSE COUNTS HAVE NOT BEEN MATERIALLY BROADENED. BUT THAT
18 ARGUMENT ASSUMES THAT THE WIRE FRAUD COUNTS ARE SIMPLY CHARGING
19 A PARTICULAR ACT OF DEFRAUDING ONE INVESTOR, BUT THAT'S NEITHER
20 HOW THE WIRE FRAUD STATUTE WORKS, NOR IS THAT WHAT THE
21 INDICTMENT CHARGES.

22 THE RELEVANT PARAGRAPH OF THE INDICTMENT IS PARAGRAPH 24,
23 AND IN THAT PARAGRAPH THE GOVERNMENT ALLEGES THAT THE
24 DEFENDANTS CAUSED THESE WIRES TO BE TRANSMITTED, AND I QUOTE,
25 "FOR THE PURPOSE OF EXECUTING THE MATERIAL SCHEME AND ARTIFICE

10:48AM 1 TO DEFRAUD INVESTORS." THE SCHEME TO DEFRAUD INVESTORS IS AN
10:48AM 2 ELEMENT OF THOSE COUNTS, OF THOSE SPECIFIC WIRE FRAUD COUNTS.
10:48AM 3 IT'S AN ESSENTIAL ELEMENT OF ANY WIRE FRAUD CHARGE.

10:48AM 4 SO THE QUESTION BECOMES WHETHER THAT ELEMENT OF THESE
10:48AM 5 COUNTS HAS BEEN MATERIALLY BROADENED AND FOR THE REASONS THAT I
10:48AM 6 JUST ARTICULATED, IT HAS.

10:48AM 7 THE PARTIES HAVE CITED A NUMBER OF CASES TO THE COURT. I
10:48AM 8 THINK IT'S FAIR TO SAY THAT NEITHER PARTY HAS FOUND A CASE THAT
10:48AM 9 IS ON ALL FOURS WITH THIS ONE. THE GOVERNMENT'S CASES ARE TO
10:48AM 10 ONE EXTREME. THEY'RE SUBSTANTIALLY EASIER CASES.

10:48AM 11 SO, FOR EXAMPLE, IN THE PACHECO CASE THE COUNTS WERE
10:49AM 12 LITERALLY COPIED VERBATIM FROM THE PRIOR INDICTMENT.

10:49AM 13 IN THE SEARS ROEBUCK CASE THE GOVERNMENT HAD CHARGED 12
10:49AM 14 FALSE STATEMENTS IN THE PRIOR INDICTMENT, AND THEN IT CHARGED
10:49AM 15 THE VERY SAME FALSE 12 STATEMENTS TO THE SAME RECIPIENT IN THE
10:49AM 16 NEXT INDICTMENT BUT CHANGED THE STATUTE OF THE CHARGING
10:49AM 17 STATUTE.

10:49AM 18 SO NONE OF THOSE CASES INVOLVE A SITUATION WHERE THE
10:49AM 19 GOVERNMENT EXPANDED A SCHEME TO DEFRAUD TWICE -- DOUBLED OR
10:49AM 20 EXPAND THE SCHEME OF THE -- THE SCOPE OF THE SCHEME BY ADDING
10:49AM 21 NEW VICTIMS.

10:49AM 22 THE CLOSEST CASE THAT WE HAVE FOUND TO THIS ONE IS THE
10:49AM 23 RATCLIFF CASE THAT WE CITED FROM THE ELEVENTH CIRCUIT WHICH
10:49AM 24 INVOLVED A DRUG CONSPIRACY CASE WHERE THE GOVERNMENT DID
10:49AM 25 SUBSTANTIALLY EXPAND BACKWARDS IN TIME THE LENGTH OF THE

1 CHARGED DRUG CONSPIRACY, AND THAT HAD THE EFFECT OF EXPANDING
2 THE NUMBER OF TRANSACTIONS AT ISSUE SUBSTANTIALLY WHICH IS
3 EXACTLY WHAT HAS HAPPENED HERE ONCE YOU SWEEP IN THE MANY, MANY
4 REPRESENTATIONS MADE TO WALGREENS AND SAFEWAY DURING THAT
5 EARLIER PERIOD OF 2010 TO 2013.

6 SO, YOU KNOW, THAT CASE I ADMIT IS NOT COMPLETELY EXACTLY
7 LIKE THIS ONE, BUT IT'S THE CLOSEST ONE THAT WE HAVE FOUND, AND
8 THAT IS ONE WHERE THE ELEVENTH CIRCUIT HELD THAT THE CHARGES
9 WERE TIME BARRED.

10 THE COURT: RIGHT. THAT IS BROAD -- I THINK ALL
11 PARTIES LOOKED AT THAT AND RATCLIFF, THEY REALLY REACHED, THEY
12 THE GOVERNMENT, OVERREACHED IN THAT CASE AND GOING BACK AND
13 CHARGING ADDITIONAL DRUG OFFENSES OUTSIDE OF THE ORIGINAL
14 SCHEME.

15 MS. SAHARIA: YES. THAT CASE THE GOVERNMENT WENT
16 BACK I THINK TEN YEARS. IT WAS EVEN MORE EGREGIOUS THAN THE
17 THREE YEARS HERE.

18 THE COURT: RIGHT.

19 MS. SAHARIA: I CONCEDE THAT POINT. BUT IT'S THE
20 CLOSEST CASE THAT WE HAVE FOUND GIVEN THE GOVERNMENT'S CASES
21 ARE NOT LIKE THIS ONE.

22 THE COURT: SURE.

23 MS. SAHARIA: SO, YOUR HONOR, THAT'S OUR POSITION
24 WITH RESPECT TO COUNTS THREE THROUGH EIGHT.

25 IF THE COURT DOESN'T HAVE ANY FURTHER QUESTIONS ABOUT

10:51AM 1 THOSE COUNTS, I'LL MOVE TO COUNTS TEN AND ELEVEN.

10:51AM 2 THE COURT: YES, PLEASE.

10:51AM 3 MS. SAHARIA: GREAT. SO TEN AND ELEVEN RELATE TO
10:51AM 4 THE ALLEGED SCHEME TO DEFRAUD PATIENTS, AND THEY CHARGE NEW
10:51AM 5 ACTS OF WIRE FRAUD OCCURRING IN MAY OF 2015, WHICH IS MORE THAN
10:51AM 6 FIVE YEARS BEFORE THE GRAND JURY RETURNED THESE INDICTMENTS
10:51AM 7 THIS SUMMER.

10:51AM 8 THE QUESTION IS WHETHER THE GOVERNMENT'S FILING OF AN
10:51AM 9 INFORMATION WITHOUT MS. HOLMES'S CONSENT IN MAY OF THIS YEAR
10:51AM 10 INSTITUTED THAT INFORMATION FOR PURPOSES OF SECTION 3282 AND
10:51AM 11 THUS TOLLED THE STATUTE OF LIMITATIONS.

10:51AM 12 THIS IS A QUESTION OF FIRST IMPRESSION IN THIS CIRCUIT.
10:51AM 13 SO YOUR HONOR GETS TO BE THE FIRST JUDGE TO DECIDE THIS
10:51AM 14 QUESTION IN THIS CIRCUIT. AND UNFORTUNATELY FOR THE COURT,
10:51AM 15 THERE'S JUST NOT VERY MUCH CASE LAW NATIONALLY ON THIS ISSUE.

10:51AM 16 THE COURT: WELL, YOU'RE FAMILIAR WITH A CASE OUT OF
10:52AM 17 MARYLAND, THE BRISCOE CASE?

10:52AM 18 MS. SAHARIA: I'M NOT FAMILIAR WITH THE BRISCOE
10:52AM 19 CASE, YOUR HONOR.

10:52AM 20 THE COURT: WELL, IT CAME OUT ON AUGUST 26TH, 2020.

10:52AM 21 MS. SAHARIA: OKAY.

10:52AM 22 THE COURT: AND, OF COURSE, IT WAS TWO DAYS BEFORE
10:52AM 23 YOUR FILING I THINK, WHICH WAS AUGUST 28TH. I HAVE A WESTLAW
10:52AM 24 CITE FOR YOU.

10:52AM 25 MS. SAHARIA: GREAT.

10:52AM 1 THE COURT: IT'S 5076053.

10:52AM 2 MS. SAHARIA: 5076503.

10:52AM 3 THE COURT: NO, NO. PARDON ME. LET ME REPEAT
10:52AM 4 MYSELF. I BEG YOUR PARDON.

10:52AM 5 5076053.

10:52AM 6 MS. SAHARIA: GOT IT. OKAY.

10:52AM 7 THE COURT: AND I KNOW IF I START TO SPEAK SLOWLY,
10:52AM 8 THAT WILL ALLOW ALL OF YOU WHO HAVE ELECTRONIC DEVICES TO
10:52AM 9 IMMEDIATELY PULL THIS CASE UP IN FRONT OF YOU.

10:52AM 10 OH, YOU KNOW, THE DAYS OF PAPER PRACTICE WHEN
10:52AM 11 MR. COOPERSMITH AND PERHAPS OTHERS WERE PRACTICING, WE RELIED
10:52AM 12 ON HARDBOUND BOOKS.

10:52AM 13 MR. WADE IS LAUGHING. HE REMEMBERS THOSE DAYS. NOW IT'S
10:53AM 14 INSTANTANEOUS. I'VE TRIED TO STRETCH THIS OUT SO YOUR PARTIES
10:53AM 15 CAN PULL THIS CASE UP AND PERHAPS YOU YOURSELF, MS. SAHARIA.

10:53AM 16 BUT IN THAT CASE IT WAS REVEALING, IT WAS VERY REVEALING,
10:53AM 17 AND IT ALSO, AS YOU MIGHT EXPECT BECAUSE OF ITS RECENCY, THE
10:53AM 18 GOOD JUDGE THERE ALSO COMMENTED ON THE COVID SITUATION AND HOW
10:53AM 19 COVID AND THE PANDEMIC HAS AFFECTED THE CASES.

10:53AM 20 MR. COOPERSMITH IS READING INTENTLY THE CASE.

10:53AM 21 (LAUGHTER.)

10:53AM 22 THE COURT: BUT IN THAT CASE THE GOOD JUDGE THERE
10:53AM 23 FOUND THAT THE TERM "PROSECUTED" AND "INSTITUTED" ARE NOT
10:53AM 24 EQUIVALENT. AND HE FOUND THAT INFORMATION IS INSTITUTED WHEN
10:53AM 25 IT IS PROPERLY FILED REGARDLESS OF THE DEFENDANT'S WAIVER.

1 FURTHER PROSECUTORIAL ACTIONS SUCH AS A TRIAL OR A PLEA
2 AGREEMENT WOULD REQUIRE A WAIVER AS RULE 7(B) SETS FORTH.

3 THE GOOD JUDGE WENT ON TO SAY THIS INTERPRETATION COMPORTS
4 WITH THE PLAIN LANGUAGE OF THE STATUTE AND RULE AND THEN HE
5 TALKS ABOUT THE OTHER CASES THAT HAVE FOUND THIS WAY. I THINK
6 YOU'RE FAMILIAR WITH THE BURDIX-DANA CASE, B-U-R-D-I-X --

7 MS. SAHARIA: YES, YOUR HONOR.

8 THE COURT: -- AND OTHERS. HE DOES CITE OTHER
9 CASES.

10 MS. SAHARIA: SO, YOUR HONOR, I'M HAPPY TO TELL THE
11 COURT WHY I BELIEVE THAT IS AN INCORRECT INTERPRETATION OF THE
12 STATUTE --

13 THE COURT: SURE.

14 MS. SAHARIA: -- GIVEN THAT IT SOUNDS LIKE THE COURT
15 ADOPTED THE REASONING OF THE BURDIX-DANA CASE FROM THE SEVENTH
16 CIRCUIT.

17 WE BELIEVE THAT ALL OF THE STANDARD TOOLS OF STATUTORY
18 CONSTRUCTION WEIGH IN FAVOR OF READING INSTITUTE AND UNDER
19 SECTION 3282 TO REQUIRE THE DEFENDANT'S CONSENT.

20 AND THERE'S FOUR RELEVANT TOOLS HERE THAT I THINK ARE
21 AVAILABLE TO THE COURT.

22 THE FIRST, OF COURSE, IS THE PLAIN MEANING OF THE WORD
23 "INSTITUTE."

24 THE PARTIES HAVE CITED TO THE COURT VARIOUS DICTIONARY
25 DEFINITIONS OF THAT TERM, ALL OF WHICH POINT TOWARDS A MEANING

10:55AM 1 THAT MEANS SOMETHING LIKE COMMENCE, PUT IN MOTION, GET GOING.

10:55AM 2 A WAIVERLESS INFORMATION DOES NOT PUT ANYTHING IN MOTION
10:55AM 3 BECAUSE IT'S A LEGAL MELODY THAT CANNOT CONFER JURISDICTION ON
10:55AM 4 THE COURT. I WOULD URGE THE COURT TO LOOK AT THE SUPREME
10:55AM 5 COURT'S DECISION IN SMITH, WHICH I THINK IS THE BEST AUTHORITY
10:55AM 6 FOR THIS PROPOSITION, AND IT'S A CASE THAT THE GOVERNMENT DID
10:55AM 7 NOT ACKNOWLEDGE AND DID NOT RESPOND TO.

10:55AM 8 THE SMITH COURT CONFRONTED A VERY SIMILAR QUESTION THERE
10:55AM 9 ACTUALLY. THERE THE GOVERNMENT HAD FILED AN INFORMATION
10:55AM 10 CHARGING A CAPITAL OFFENSE, WHICH IS PROHIBITED BY RULE 7(A).

10:55AM 11 UNDER RULE 7(A) THE GOVERNMENT CANNOT CHARGE A CAPITAL
10:55AM 12 OFFENSE BY INFORMATION EITHER WITH OR WITHOUT CONSENT. AND
10:56AM 13 THERE THE DEFENDANT HAD CONSENTED AND THE QUESTION WAS BEFORE
10:56AM 14 THE SUPREME COURT WAS WHAT IS THE EFFECT OF THIS -- OF THE
10:56AM 15 FILING OF THIS INFORMATION CHARGING A CAPITAL OFFENSE?

10:56AM 16 AND THE SUPREME COURT HELD, AND THIS IS A DIRECT QUOTE,
10:56AM 17 "UNDER OUR VIEW OF RULE 7(A), THE UNITED STATES ATTORNEY DID
10:56AM 18 NOT HAVE AUTHORITY TO FILE AN INFORMATION IN THIS CASE AND THE
10:56AM 19 WAIVERS MADE BY PETITIONER WERE NOT BINDING AND DID NOT CONFER
10:56AM 20 POWER ON THE CONVICTING COURT TO HEAR THE CASE."

10:56AM 21 SO THE SUPREME COURT READING RULE 7(A) DID NOT SAY THAT
10:56AM 22 RULE 7(A) ONLY BARRED PROSECUTION BY INFORMATION.

10:56AM 23 THE SUPREME COURT READING RULE 7(A) SAID IT BARRED THE
10:56AM 24 UNITED STATES ATTORNEY FROM EVEN HAVING AUTHORITY TO FILE AN
10:56AM 25 INFORMATION.

1 AND WE SUBMIT THAT THIS CASE IS NO DIFFERENT. THAT'S
2 EXACTLY WHAT THE GOVERNMENT'S POSITION IS HERE THAT RULE 7
3 ALLOWS IT TO FILE AN INFORMATION EVEN IF IT CAN'T PROSECUTE ON
4 IT.

5 AND THE SUPREME COURT REJECTED THAT POSITION IN SMITH.

6 THE COURT: THERE'S NO DISTINCTION BETWEEN THE
7 OFFENSES? AS YOU SAY, IT'S PROHIBITED TO FILE AN INFORMATION
8 ON A CAPITAL OFFENSE. IS THAT A DISTINCTION THAT MATTERS HERE?

9 MS. SAHARIA: I DON'T THINK SO BECAUSE IN BOTH CASES
10 THE RELEVANT QUESTION IS DOES RULE 7 BAR ONLY A PROSECUTION OR
11 DOES IT BAR FILING?

12 AND THE SUPREME COURT HELD THAT IN A CASE WHERE THE RULE
13 DOES NOT PERMIT PROSECUTION BY INFORMATION, WHICH IN THAT CASE
14 IT DID NOT, THE UNITED STATES ATTORNEY LACKS AUTHORITY TO FILE
15 AN INFORMATION.

16 SO I DON'T THINK THAT THAT DISTINCTION, THAT DISTINCTION
17 MATTERS.

18 AGAIN, THE GOVERNMENT HASN'T EVEN ADDRESSED THIS CASE IN
19 ITS PAPERS, NOR HAS IT ADDRESSED A MORE GENERAL PROPOSITION
20 THAT NONE OF THE COURTS HAVE ADDRESSED THAT THE FILING OF AN
21 INFORMATION WITHOUT A CONSENT DOESN'T CONFER JURISDICTION ON
22 COURTS.

23 SO THAT'S THE FIRST POINT, UNLESS YOUR HONOR HAS A
24 QUESTION ABOUT THAT.

25 THE COURT: NO. NO. THANK YOU.

1 MS. SAHARIA: OKAY. THE SECOND AVAILABLE TOOL THAT
2 THE COURT SHOULD USE IS LOOKING TO THE STATUTORY CONTEXT. SO
3 WHEN WE'RE INTERPRETING A WORD, WE LOOK AT HOW CONGRESS HAS
4 USED THAT WORD ELSEWHERE, WE LOOK AT WHETHER CONGRESS HAS USED
5 DIFFERENT WORDS ELSEWHERE. AND WHEN WE LOOK AT THE RELEVANT
6 CHAPTER OF TITLE 18, WE SEE THAT CONGRESS SOMETIMES USED THE
7 WORD "INSTITUTE" WHEN REFERRING TO A STATUTE OF LIMITATIONS AND
8 SOMETIMES USED THE WORD "FILE."

9 AND UNDER STANDARD CANONS OF CONSTRUCTION, COURTS ARE
10 SUPPOSED TO ASSUME THAT CONGRESS SAYS WHAT IT MEANS AND WHEN IT
11 USES DIFFERENT WORDS, IT INTENDS THOSE WORDS TO HAVE DIFFERENT
12 MEANINGS, AND WE BELIEVE THAT FACT REQUIRES THE COURT TO
13 INTERPRET "INSTITUTE" NOT TO MEAN "FILE." SO THAT'S THE SECOND
14 CLUE THAT WE CAN TAKE FROM THE STATUTE.

15 THE THIRD CLUE IS HOW HAS THE SUPREME COURT OR THE
16 NINTH CIRCUIT OR OTHER BINDING AUTHORITY CONSTRUED THE WORD
17 "INSTITUTE" AND OTHER STATUTES OF LIMITATION? "AND HERE WE
18 HAVE THE JABEN CASE, WHICH I BELIEVE THE COURT IS NOW FAMILIAR
19 WITH, WHERE THE SUPREME COURT CONSTRUED THE WORD "INSTITUTE"
20 AND THE STATUTORY OF LIMITATIONS TO REQUIRE THE CHARGING
21 DOCUMENTS TO BE EFFECTIVE TO COMMENCE CRIMINAL PROCEEDINGS, AND
22 IT EXPRESSED CONCERN ABOUT EXACTLY THE GOVERNMENT'S POSITION
23 HERE, WHICH WOULD BE THAT THE GOVERNMENT CAN SIMPLY FILE A
24 DOCUMENT EVEN IF IT HASN'T MADE ITS CASE AT THE VERY END OF THE
25 LIMITATIONS PERIOD IN ORDER TO OBTAIN UNILATERALLY AN EXTENSION

1 OF THE LIMITATIONS PERIOD TO MAKE ITS CASE.

2 AND THE SUPREME COURT SAID THAT READING FAILED TO PROVIDE
3 DEFENDANTS WITH THE REQUISITE SAFEGUARD, AND, THEREFORE,
4 REQUIRED THE CHARGING DOCUMENT IN THAT CASE TO BE EFFECTIVE TO
5 COMMENCE PROCEEDINGS.

6 AND THEN THE FOURTH TOOL IS THAT WHEN THERE IS AN
7 AMBIGUITY IN THE STATUTE, AFTER APPLYING ALL OF THE REGULAR
8 TOOLS, THE SUPREME COURT HAS SAID THAT COURTS SHOULD RESOLVE
9 AMBIGUITIES IN FAVOR OF REPOSE. AND WE BELIEVE HERE THAT TO
10 THE EXTENT THAT THERE'S ANY AMBIGUITY IN THE STATUTE LEFT AFTER
11 APPLYING THE REGULAR TOOLS THAT REQUIRES READING THE STATUTE IN
12 FAVOR OF THE DEFENSE.

13 NOW, THE GOVERNMENT HANGS ITS HAT ON THE BURDIX-DANA CASE.
14 IT SOUNDS FROM YOUR HONOR'S DESCRIPTION THAT THE BRISCOE COURT
15 SEEMS TO HAVE ADOPTED THE REASONING OF THE BURDIX-DANA CASE.

16 THE BURDIX-DANA COURT DIDN'T APPLY ANY OF THE STANDARD
17 TOOLS OF CONSTRUCTION THAT I'VE JUST ADDRESSED. IT DIDN'T LOOK
18 TO THE ORDINARY MEANING OF "INSTITUTE." IT DIDN'T CONSULT
19 DEFINITIONS. IT DIDN'T LOOK TO THE STATUTORY STRUCTURE. IT
20 DIDN'T CONSIDER THE POLICY AND FAVOR OF REPOSE, AND IT
21 ADDRESSED THE JABEN CASE IN A FOOTNOTE WITH RATHER POOR ATTEMPT
22 TO DISTINGUISH IT.

23 AND THE RATIONALE OF THE SEVENTH CIRCUIT WAS THE REASON --
24 WAS THE RATIONALE THAT RULE 7 ONLY BARS PROSECUTION AND NOT
25 FILING. AND FOR THE REASON THAT I'VE ARTICULATED WITH RESPECT

11:01AM 1 TO THE SMITH CASE, WE DON'T THINK THAT IS COMPATIBLE WITH
11:01AM 2 BINDING SUPREME COURT AUTHORITY. AND THE SEVENTH CIRCUIT
11:01AM 3 DIDN'T CONSIDER SMITH AT ALL.

11:01AM 4 SO FOR THAT REASON WE URGE THE COURT NOT TO FOLLOW THE
11:01AM 5 SEVENTH CIRCUIT APPROACH.

11:01AM 6 NOW, I WOULD KIND OF CLOSE WITH THE FOLLOWING COMMENT,
11:01AM 7 WHICH IS I THINK THERE ARE THREE APPROACHES THAT ARE AVAILABLE
11:01AM 8 TO THE COURT IN DECIDING THIS QUESTION.

11:01AM 9 THE FIRST, OF COURSE, IS THE GOVERNMENT'S APPROACH WHICH
11:01AM 10 THE GOVERNMENT HAS OFFERED THE COURT NO LIMITING PRINCIPLE AT
11:01AM 11 ALL. THEY HAVE ARTICULATED A VERY BROAD RULE THAT WOULD PERMIT
11:01AM 12 THE GOVERNMENT ON ITS OWN TO EXTEND THE STATUTE OF LIMITATIONS
11:02AM 13 IN ANY CASE SIMPLY BY FILING AN INFORMATION AT THE END OF THE
11:02AM 14 FIVE-YEAR PERIOD, AND, THEREFORE, BUYING ITSELF AT LEAST
11:02AM 15 SIX MONTHS, IF NOT MORE, TO INDICT A DEFENDANT. THAT IS THEIR
11:02AM 16 POSITION.

11:02AM 17 THEY INVOKE THE COVID PANDEMIC, BUT THEY DON'T OFFER THE
11:02AM 18 COURT ANY LEGAL RATIONALE THAT WOULD CONFINE THEIR POSITION TO
11:02AM 19 THE PANDEMIC, NOR DO THEY ARTICULATE HOW THAT AFFECTED THEIR
11:02AM 20 DELAY HERE.

11:02AM 21 THEY SUGGEST THAT THEY WANTED TO ADD THESE NEW COUNTS IN
11:02AM 22 LIGHT OF THE COURT'S RULING IN FEBRUARY WITH RESPECT TO
11:02AM 23 DISMISSING COUNTS -- DISMISSING THE CHARGES AS THEY RELATE TO
11:02AM 24 NONPAYING PATIENTS. BUT IF THEY BELIEVE THAT THE EFFECT OF
11:02AM 25 THAT RULING WAS TO ACTUALLY DISMISS COUNTS, THEY WOULD HAVE

1 INVOKED SECTION 3288 AND ITS SIX-MONTH GRACE PERIOD, AND THEY
2 HAVEN'T DONE THAT, NOR HAVE THEY EXPLAINED WHY THE COURT'S
3 RULING REQUIRED THEM TO ADD A COUNT. THEY DIDN'T JUST SWAP OUT
4 ONE COUNT FOR ANOTHER COUNT. THEY ACTUALLY ADDED ANOTHER BRAND
5 NEW COUNT, AND THEY'VE ARTICULATED NO REASON WHY THE RULING
6 REQUIRED THEM TO ADD A COUNT.

7 SO THAT'S THEIR POSITION. IT'S A VERY BROAD POSITION WITH
8 NO LIMITING PRINCIPLE.

9 OF COURSE, OUR POSITION IS THE OPPOSITE, WHICH IS THAT THE
10 MERE FILING OF AN INFORMATION WITHOUT CONSENT CAN NEVER
11 INSTITUTE IT UNDER SECTION 3282. I DO THINK THERE'S A MIDDLE
12 GROUND THAT IS AVAILABLE TO THE COURT IF YOUR HONOR IS NOT
13 SATISFIED WITH THE TWO BROAD POSITIONS, AND THAT IS TO SAY THAT
14 AT A MINIMUM THAT FOR AN INFORMATION TO BE INSTITUTED, IT MUST
15 BE EFFECTIVE TO DO SOMETHING UNDER THE CRIMINAL RULES.

16 AND AS WE EXPLAINED IN OUR REPLY BRIEF, FOR AN INFORMATION
17 TO DO SOMETHING UNDER THE CRIMINAL RULES TO SET SOMETHING IN
18 MOTION, WHICH THE FIRST STEP, OF COURSE, WOULD BE TO ARREST THE
19 DEFENDANT, THE INFORMATION MUST BE SUPPORTED BY AN AFFIDAVIT
20 ESTABLISHING PROBABLE CAUSE. THAT MAKES SENSE BECAUSE WITHOUT
21 THAT REQUIREMENT, THE GOVERNMENT COULD JUST FILE AN INFORMATION
22 WITHOUT ESTABLISHING PROBABLE CAUSE, AND, THEREFORE, SATISFY
23 THE STATUTE OF LIMITATIONS, AND THEY DIDN'T DO THAT HERE.

24 SO IF THE COURT DIDN'T WANT TO STAKE OUT A BOLD POSITION
25 EITHER WAY GIVEN THAT, YOU KNOW, ADMITTEDLY BOTH POSITIONS ARE

11:04AM 1 SOMEWHAT OF AN EXTREME, I DO THINK THAT THAT MIDDLE GROUND IS
11:04AM 2 AVAILABLE TO THE COURT, AND THE GOVERNMENT'S FAILURE TO COMPLY
11:04AM 3 WITH THAT REQUIREMENT HERE WOULD REQUIRE DISMISSAL OF THESE TWO
11:04AM 4 COUNTS.

11:04AM 5 THE COURT: ALL RIGHT. THANK YOU VERY MUCH,
11:04AM 6 MS. SAHARIA.

11:04AM 7 MS. BAEHR-JONES, ARE YOU GOING TO SPEAK FOR THE GOVERNMENT
11:04AM 8 HERE?

11:04AM 9 MS. BAEHR-JONES: YES, I WILL, YOUR HONOR.

11:04AM 10 SO I'D LIKE TO START WITH ADDRESSING THE FIRST ISSUE,
11:04AM 11 WHICH IS THE TIME BARRED -- THEIR ARGUMENT THAT THE INVESTOR
11:05AM 12 COUNTS ARE TIME BARRED.

11:05AM 13 AND I JUST WANT TO TAKE A STEP BACK BECAUSE WHAT THE
11:05AM 14 DEFENSE IS ARGUING THAT THE COURT ADOPT IS A SORT OF HYPER
11:05AM 15 TECHNICAL ELEMENTS-BASED APPROACH TO LOOKING AT WHETHER OR NOT
11:05AM 16 THE DEFENSE HAD NOTICE OF ALL OF THIS CONDUCT IN THE FIRST
11:05AM 17 SUPERSEDING INDICTMENT BY SAYING THAT ONE ELEMENT OF THIS HAS
11:05AM 18 CHANGED.

11:05AM 19 BUT SEARS ROEBUCK AND ALL OF THE CASE LAW IN THIS AREA
11:05AM 20 STAND FOR THE PROPOSITION THAT THIS IS NOT AN ELEMENTS-BASED
11:05AM 21 APPROACH; THAT, IN FACT, THE GOVERNMENT COULD ALLEGE A NEW
11:05AM 22 CRIME WITH A NEW SERIES OF ELEMENTS, AND THAT WOULD STILL
11:05AM 23 RELATE BACK SO LONG AS IT ADDRESSED APPROXIMATELY THE SAME SET
11:05AM 24 OF FACTS AND THE SAME CONDUCT AS WHAT WAS ALLEGED IN THE
11:05AM 25 PREVIOUS INSTRUMENT, IN THE PREVIOUS INDICTMENT.

1 AND THE DEFENSE HAS POINTED TO NO ADDITIONAL CONDUCT THAT
2 IS -- THAT HAS COME INTO PLAY WITH THE SUBSEQUENT INDICTMENTS,
3 THAT THEY WERE NOT ON NOTICE OF IN THE FIRST INDICTMENT.

4 SO EVEN ASSUMING THAT, AND WE DO NOT AGREE WITH THIS, THAT
5 THE DEFINITION OF "INVESTOR" HAD SOMEHOW EXPANDED IN THE THIRD
6 SUPERSEDING INDICTMENT, AND AGAIN, WE DON'T AGREE THAT IT HAS,
7 BUT EVEN ASSUMING THAT IT HAD, THEY HAVE NOT ARTICULATED HOW
8 THAT WOULD, WOULD UNDERMINE THE FACT THAT THEY HAD NOTICE THAT
9 THE GOVERNMENT CONSIDERED INVESTORS ONE THROUGH SIX TO BE
10 INVESTORS IN THE FIRST SUPERSEDING INDICTMENT, AND THAT IT GAVE
11 NOTICE TO THEM THAT IT CONSIDERED THOSE ENTITIES TO BE
12 INVESTORS, AND THAT THE CONDUCT RELATED TO THOSE INDIVIDUALS
13 AND ENTITIES WAS CONDUCT THAT WAS COVERED BY THE FIRST
14 SUPERSEDING INDICTMENT.

15 AND HERE THE RATCLIFF CASE ACTUALLY WAS QUITE HELPFUL TO
16 THE GOVERNMENT. AND THAT CASE FURTHER GOES TO THE POINT THAT
17 THIS IS A CONDUCT-BASED APPROACH AND IN RATCLIFF THERE WAS --
18 THE GOVERNMENT FIRST INDICTED ON ONE ATTEMPTED IMPORTATION OF
19 DRUGS FROM JAMAICA AND THEN AFTER GETTING MORE EVIDENCE WENT
20 BACK AND INDICTED ADDITIONAL SMUGGLING ACTIVITIES.

21 SO AGAIN, IT GOES BACK TO WHAT IS THE CONDUCT THAT WAS
22 INCLUDED IN THAT SECOND INDICTMENT THAT GAVE FURTHER NOTICE
23 THAT WAS BEYOND THE SCOPE OF THE CONDUCT THAT WAS NOTICED IN
24 THE FIRST INDICTMENT?

25 AND AGAIN, LOOKING HERE, THAT'S NOT WHAT HAS HAPPENED

11:07AM 1 HERE. THE CONDUCT THAT WAS AT ISSUE IN THE INDIVIDUAL WIRE
11:07AM 2 FRAUD COUNTS THAT ARE ALLEGED IN THE FIRST SUPERSEDING
11:07AM 3 INDICTMENT FOR INVESTORS ONE THROUGH SIX IS THE EXACT SAME
11:07AM 4 CONDUCT THAT WAS ALLEGED IN THE THIRD SUPERSEDING INDICTMENT
11:07AM 5 AND THE FIRST SUPERSEDING INDICTMENT.

11:07AM 6 I FINALLY POINT THE COURT TO -- THERE IS ALSO A LANGUAGE
11:07AM 7 DIFFERENCE HERE, WHICH IS THAT THE LANGUAGE THAT THE GOVERNMENT
11:07AM 8 USED IN THE FIRST SUPERSEDING INDICTMENT TO ALLEGE THE TIME
11:07AM 9 PERIOD IS FROM A TIME UNKNOWN BUT NO LATER THAN 2013.

11:07AM 10 AND IN THE FIRST SUPERSEDING INDICTMENT, AS OPPOSED TO THE
11:07AM 11 ORIGINAL INDICTMENT, THE GOVERNMENT LAID FORTH A VERY COMPLETE
11:08AM 12 HISTORY OF THE COMPANY, A VERY THOROUGH HISTORY OF THE
11:08AM 13 ACTIVITIES THAT THE COMPANY ENGAGED IN.

11:08AM 14 IT'S SIMPLY NOT THE CASE THAT THE CONDUCT THAT IS ALLEGED
11:08AM 15 IN THE SUPERSEDING INSTRUMENTS WAS NOT INCLUDED IN THAT INITIAL
11:08AM 16 INDICTMENT AND THAT THE DEFENDANT HAS NOT BEEN ON NOTICE OF
11:08AM 17 THAT CONDUCT SINCE THE INITIAL INDICTMENT WHEN IT COMES TO THE
11:08AM 18 INVESTOR COUNTS ONE THROUGH SIX.

11:08AM 19 THE COURT: ARE YOU SUGGESTING THAT THE DEFENDANTS
11:08AM 20 HAD NOTICE THAT THE TIMEFRAME COULD HAVE EXTENDED TO 2010
11:08AM 21 BECAUSE THE ORIGINAL INDICTMENT HAD USED THE WORD "A TIME
11:08AM 22 UNKNOWN"?

11:08AM 23 MS. BAEHR-JONES: YES, YOUR HONOR, BUT I THINK IT'S
11:08AM 24 A COMBINATION OF TWO THINGS. IT'S, ONE, BECAUSE THE LANGUAGE
11:08AM 25 IN THE ORIGINAL INDICTMENT WAS -- INCLUDED "A TIME UNKNOWN,"

11:08AM 1 BUT ALSO BECAUSE WE'RE TALKING ABOUT VERY SPECIFIC INVESTORS.
11:08AM 2 WE'RE NOT TALKING ABOUT THE CONSPIRACY AS A WHOLE.

11:08AM 3 WE'RE TALKING ABOUT THE ALLEGATIONS THAT INVESTORS ONE
11:08AM 4 THROUGH SIX WERE DEFRAUDED.

11:08AM 5 SO THE CONDUCT THAT INCLUDED MISREPRESENTATIONS, AND
11:08AM 6 OMISSIONS, AND HALF-TRUTHS THAT WERE DIRECTED TOWARDS INVESTORS
11:09AM 7 ONE THROUGH SIX, THAT CONDUCT HAS NOT CHANGED AT ALL. IN FACT,
11:09AM 8 THE DEFENDANTS DON'T POINT TO ANY ADDITIONAL CONDUCT THAT HAS
11:09AM 9 NOW COME INTO PLAY IN THE THIRD SUPERSEDING INDICTMENT THAT
11:09AM 10 WASN'T PART OF THE CASE ALL ALONG.

11:09AM 11 SO IT'S BOTH --

11:09AM 12 THE COURT: MS. BAEHR-JONES, WE'RE LOSING SOME
11:09AM 13 CONNECTIVITY. LET ME -- I THINK YOUR WI-FI IS BREAKING UP.

11:09AM 14 MADAM COURT REPORTER: PLEASE REPEAT THE LAST
11:09AM 15 SENTENCE.

11:09AM 16 (PAUSE IN PROCEEDINGS.)

11:09AM 17 MS. BAEHR-JONES: YES, YOUR HONOR. THANK YOU.

11:09AM 18 THE LAST SENTENCE -- SO I BELIEVE I WAS TALKING ABOUT THAT
11:09AM 19 THERE'S NO NEW CONDUCT WITH RESPECT TO INVESTORS ONE THROUGH
11:09AM 20 SIX THAT THEY'VE POINTED TO, THAT THE DEFENSE HAS POINTED TO,
11:10AM 21 THAT COMES -- THAT IS NOW AT ISSUE IN THE THIRD SUPERSEDING
11:10AM 22 INDICTMENT THAT WASN'T ALWAYS INCORPORATED AND ALWAYS A PART OF
11:10AM 23 THE CASE FROM THE VERY -- FROM THE FIRST SUPERSEDING INDICTMENT
11:10AM 24 WHEN INVESTORS ONE THROUGH SIX WERE ALLEGED AS WIRE FRAUD
11:10AM 25 COUNTS.

11:10AM 1 THE COURT: OKAY. THANK YOU.

11:10AM 2 DO YOU WANT TO TALK ABOUT TEN AND ELEVEN?

11:10AM 3 MS. BAEHR-JONES: UNLESS YOUR HONOR HAS ANY
11:10AM 4 QUESTIONS, I'LL SUBMIT.

11:10AM 5 THE COURT: I'M SORRY, MS. BAEHR-JONES.

11:10AM 6 WE'RE HAVING SOME DIFFICULTY WITH YOUR WI-FI. YOU'RE
11:10AM 7 FREEZING, AND WE'RE NOT ABLE TO HEAR YOU ENTIRELY.

11:10AM 8 WHAT I'M TOLD HELPS IS IF YOU DISENGAGE THE VIDEO AND
11:10AM 9 SOMETIMES THAT ASSISTS.

11:10AM 10 ARE YOU THERE?

11:10AM 11 MS. BAEHR-JONES: I AM HERE, YOUR HONOR. I
11:10AM 12 DISENGAGED THE VIDEO.

11:11AM 13 DOES THAT HELP?

11:11AM 14 THE COURT: IT SEEMS TO. IT SEEMS TO HAVE HELPED.
11:11AM 15 WE WON'T BE ABLE TO SEE YOU, BUT WE CAN CERTAINLY HEAR YOU.

11:11AM 16 MS. BAEHR-JONES: OKAY. THANK YOU, YOUR HONOR. I
11:11AM 17 APOLOGIZE FOR THE INCONVENIENCE TO THE COURT.

11:11AM 18 THE COURT: NOT AT ALL.

11:11AM 19 MS. BAEHR-JONES: I JUST WANT TO MAKE SURE THAT THE
11:11AM 20 COURT DIDN'T HAVE ANY QUESTIONS ABOUT THE FIRST ISSUE BEFORE I
11:11AM 21 MOVED ON TO THE SECOND ISSUE.

11:11AM 22 THE COURT: NO. WHY DON'T YOU MOVE TO THE SECOND
11:11AM 23 ISSUE IF YOU WOULD, PLEASE.

11:11AM 24 I SUPPOSE -- WELL, THE ONE QUESTION IS, AND I THINK YOU'VE
11:11AM 25 ANSWERED IT, MY QUESTION WAS GOING TO BE, HAS THIS EXPANDED THE

11:11AM 1 CHARGES? AND WHY DO YOU FEEL IT HASN'T? AND WHY ISN'T IT A
11:11AM 2 BROADENING OF THE CHARGES AS IN RATCLIFF AND THESE OTHERS? BUT
11:11AM 3 I THINK YOU TOUCHED ON IT.

11:11AM 4 UNLESS THERE'S ANYTHING ELSE THAT YOU WANT ME TO KNOW
11:11AM 5 ABOUT THAT.

11:11AM 6 MS. BAEHR-JONES: NO, YOUR HONOR. I THINK THIS
11:11AM 7 WOULD BE DIFFERENT IF IT WEREN'T FOR THE FACT THAT THIS IS
11:11AM 8 SPECIFICALLY ALLEGED INVESTOR COUNTS, AND SO THE CONDUCT THAT
11:11AM 9 WAS ALWAYS AT ISSUE IN A SCHEME TO DEFRAUD THESE INVESTORS IS
11:11AM 10 THE SAME CONDUCT HERE. IT'S THE SAME MISREPRESENTATIONS, IT'S
11:12AM 11 THE SAME HALF-TRUTHS, IT'S THE SAME OMISSIONS.

11:12AM 12 THE DEFENSE HASN'T POINTED TO ANY NEW CONDUCT HERE THAT IS
11:12AM 13 RELEVANT. AGAIN, I THINK THEY'RE URGING THE COURT TO TAKE A
11:12AM 14 VERY TECHNICAL, HYPER TECHNICAL ELEMENTS-BASED APPROACH WHEN
11:12AM 15 THE CASE LAW IS THAT WE SHOULD BE AT ARE THESE APPROXIMATELY
11:12AM 16 THE SAME SET OF FACTS? AND THEY ARE.

11:12AM 17 THE COURT: OKAY. THANK YOU.

11:12AM 18 MS. BAEHR-JONES: THANK YOU, YOUR HONOR.

11:12AM 19 AND TURNING TO THE SECOND, THE SECOND POINT, I'D JUST LIKE
11:12AM 20 TO ADDRESS TWO ISSUES THAT THE DEFENSE RAISED.

11:12AM 21 FIRST IS THAT THE GOVERNMENT AGREES WITH YOUR HONOR THAT
11:12AM 22 SMITH IS NOT ON POINT HERE, THAT THAT IS A CASE THAT DEALS
11:12AM 23 SPECIFICALLY WITH THE CAPITAL OFFENSE. THE RULES REGARDING --
11:12AM 24 ALLEGING A CAPITAL OFFENSE IS NOT APPLICABLE AND SIMPLY NOT ON
11:12AM 25 POINT HERE.

1 SECOND, I THINK IT'S WORTH TO POINT OUT THAT UNITED
2 STATES -- JABEN VERSUS UNITED STATES WAS DECIDED 55 YEARS AGO
3 NOW AND HAS NEVER ONCE BEEN EXPANDED BY THE SUPREME COURT OR BY
4 ANY CIRCUIT COURT IN THE WAY THAT THE DEFENSE URGES THE COURT
5 TO EXPAND THE HOLDING IN JABEN HERE.

6 IN FACT, BURDIX-DANA 20 YEARS AGO WHEN THERE WAS A
7 PETITION TO THE SUPREME COURT, THE PETITIONER MADE ALL OF THE
8 SAME ARGUMENTS THAT THE DEFENSE IS ADVANCING HERE FOR WHY JABEN
9 SHOULD BE EXPANDED, AND THE SUPREME COURT DID NOT GRANT CERT
10 AND NOT SINCE THEN HAS IT BEEN EXPANDED IN SUCH A WAY. SO THE
11 GOVERNMENT WOULD URGE THE COURT NOT TO DO SO NOW.

12 AND THEN FINALLY, YOUR HONOR, HOLMES ARGUES THAT THERE IS
13 GOING TO BE STAGGERING IMPLICATIONS IF THE COURT ADOPTS THE
14 PLAIN LANGUAGE READING OF SECTION 3282 THAT BURDIX-DANA HAS
15 ADOPTED AND THAT OTHER COURTS, INCLUDING THE CASE THAT
16 YOUR HONOR HAS CITED TODAY, HAS ADOPTED, AND THAT'S SIMPLY NOT
17 THE CASE.

18 IN THE 20 YEARS SINCE BURDIX-DANA THIS HAS RARELY COME UP
19 AND THAT'S BECAUSE IT'S NOT IN THE GOVERNMENT'S INTEREST TO USE
20 SECTION 3282 IN THE WAY THAT THE DEFENSE IS CLAIMING THAT IT
21 SHOULD BE USED AND THE GOVERNMENT HASN'T FOR THE MOST PART.

22 AND HERE WE ARE IN A PUBLIC HEALTH CRISIS, AND IT SIMPLY
23 IS NOT THE CASE THAT THIS HAS BEEN USED IN A WAY THAT THE
24 DEFENSE IS SORT OF ALLEGING.

25 THEY HAD PLENTY OF NOTICE HERE, AND THE GOVERNMENT WOULD

11:14AM 1 URGE THE COURT TO FOLLOW BURDIX-DANA AND THE OTHER COURTS THAT
11:14AM 2 HAVE APPLIED 3282 IN WAY -- IN THE PLAIN LANGUAGE READING THE
11:14AM 3 WAY THE GOVERNMENT ADVANCES HERE.

11:14AM 4 THE COURT: MS. SAHARIA, I'LL GIVE YOU THE LAST WORD
11:14AM 5 AND THEN I'D LIKE TO MOVE ON.

11:14AM 6 BUT LET ME ASK, MR. COOPERSMITH, DO YOU WANT TO ADD
11:14AM 7 ANYTHING OR DO YOU HAVE RECIPROCITY IN YOUR CONFIDENCE WITH
11:14AM 8 MS. SAHARIA?

11:14AM 9 MR. COOPERSMITH: THANK YOU, YOUR HONOR. I HAVE
11:14AM 10 TOTAL CONFIDENCE IN MS. SAHARIA.

11:14AM 11 BUT WHILE SHE WAS SPEAKING BEFORE, DESPITE MY ADVANCED
11:14AM 12 AGE, I WAS ABLE TO PULL UP THE BRISCOE CASE AND QUICKLY READ
11:15AM 13 IT. IT WAS MERCIFULLY SHORT, AND I JUST HAVE A FEW COMMENTS
11:15AM 14 ABOUT BRISCOE SINCE THE COURT MENTIONED IT.

11:15AM 15 THIS IS THE DISTRICT OF MARYLAND FROM VERY RECENT TIMES IN
11:15AM 16 LATE AUGUST OF THIS YEAR.

11:15AM 17 SO, FIRST OF ALL, THE BRISCOE COURT SAYS THAT IT
11:15AM 18 RECOGNIZES THAT THERE'S A DIFFERENCE BETWEEN, QUOTE,
11:15AM 19 "INSTITUTING" AND "PROSECUTING," RIGHT? AND THAT'S THE
11:15AM 20 DISTINCTION THAT IT SAYS EXISTS.

11:15AM 21 BUT THEN INEXPLICABLY, IN MY VIEW, THE BRISCOE COURT THEN
11:15AM 22 SAYS, BUT THE TERM "INSTITUTED" IS EXACTLY THE SAME MEANING AS
11:15AM 23 "FILED." THAT'S WHAT BRISCOE SAYS.

11:15AM 24 AND WITH RESPECT TO THE JUDGE IN THE DISTRICT OF MARYLAND,
11:15AM 25 I THINK THAT'S JUST FLAT OUT WRONG.

1 AND ONE WAY TO ILLUSTRATE THAT IS IN THIS CASE THE
2 GOVERNMENT HERE WAS REALLY DESPERATE TO SAY THAT THERE IS
3 SOMETHING, SOMETHING THAT AN INFORMATION WITHOUT AN AFFIDAVIT
4 ACCOMPLISHES.

5 AND THEY SAID, WELL, THE THING THAT AN INFORMATION
6 ACCOMPLISHES IS THAT IT SETS OFF THE NEED FOR A PRELIMINARY
7 HEARING.

8 AND AS IS POINTED OUT IN THE REPLY BRIEF, YOUR HONOR, THAT
9 IS JUST WRONG.

10 WHEN YOU LOOK AT THE INTERACTION OF RULES 4, 5, 5.1, AND
11 9, THERE CANNOT BE A PRELIMINARY HEARING. UNDER RULE 5.1 NO
12 PRELIMINARY HEARING CAN BE SCHEDULED WITHOUT THE INITIAL
13 APPEARANCE.

14 THERE IS NO INITIAL APPEARANCE WITHOUT AN ARREST WARRANT
15 OR SUMMONS, AND YOU CANNOT GET SUCH A THING WITHOUT AN
16 INFORMATION ACCOMPANIED BY AFFIDAVITS, WHICH THIS ONE WAS NOT.

17 SO I THINK BRISCOE GOT THAT WRONG, TOO, ON THE RULE 9
18 ANALYSIS I'LL CALL IT.

19 AND THEN FINALLY, YOUR HONOR, AS TO BRISCOE, IT DOES POINT
20 OUT IN A FOOTNOTE THAT IT IS JUST DECIDING NOT TO FOLLOW THE
21 DISTRICT OF MASSACHUSETTS IN THE MACHADO CASE, AND I THINK THAT
22 IS THE BETTER REASONED CASE. I THINK THE JUDGE IN THE
23 EASTERN DISTRICT OF VIRGINIA IN STEWART WANTED TO FOLLOW
24 MACHADO BUT FOR SOME REASON HE FELT HIMSELF BOUND BY THE
25 SEVENTH CIRCUIT IN BURDIX.

11:16AM 1 BUT I THINK THE MACHADO CASE FROM THE DISTRICT OF
11:17AM 2 MASSACHUSETTS IS THE BETTER REASONED CASE ON THIS POINT, AND I
11:17AM 3 DON'T THINK BRISCOE, WHICH IS A SHORT ANALYSIS, REALLY GETS IT
11:17AM 4 RIGHT. SO I WOULD URGE THE COURT NOT TO FOLLOW THE LEAD OF
11:17AM 5 BRISCOE. THANK YOU.

11:17AM 6 THE COURT: ALL RIGHT. THANK YOU. DO YOU HAVE ANY
11:17AM 7 COMMENTS ABOUT THE GOOD JUDGE'S COMMENTS ON THE COVID
11:17AM 8 SITUATION?

11:17AM 9 MR. COOPERSMITH: YOU KNOW, YOUR HONOR, I HAVE TO
11:17AM 10 CONFESS, I DIDN'T REALLY GET TO THAT PART OF THE OPINION, BUT I
11:17AM 11 CAN IMAGINE WHAT IT IS.

11:17AM 12 I MEAN, THE COVID SITUATION IS, OF COURSE, UNFORTUNATE FOR
11:17AM 13 ALL OF US AND EVERYONE IN THE WORLD, BUT IN THIS CASE I DON'T
11:17AM 14 THINK IT HAS ANY LEGAL SIGNIFICANCE.

11:17AM 15 FIRST OF ALL, THE RULES ARE THE RULES, AND THERE'S NO
11:17AM 16 EXCEPTION TO THE RULES BASED ON COVID.

11:17AM 17 BUT MORE TO THE POINT, THE GOVERNMENT, IF THEY WANTED TO
11:17AM 18 SUPERSEDE AND ADD, YOU KNOW, ENORMOUSLY EXPANDED CHARGES
11:17AM 19 DOUBLING THE TIMEFRAME ADDING GIANT CORPORATIONS AND BOARD
11:17AM 20 MEMBERS AND ALL OF THE THINGS THAT WE HAVE ALREADY EXPLAINED,
11:17AM 21 THEY COULD HAVE DONE THAT AT ANY POINT BEFORE THE COVID CRISIS
11:17AM 22 SHUT DOWN THE GRAND JURY IN I BELIEVE EARLY MARCH.

11:17AM 23 SO I DON'T THINK THAT'S REALLY NEITHER HERE NOR THERE AND
11:18AM 24 CERTAINLY IT DOESN'T ENTITLE THE GOVERNMENT TO DISREGARD THE
11:18AM 25 RULES AND FILE A PIECE OF PAPER.

11:18AM 1 AND THEN FINALLY, YOUR HONOR, AS MS. SAHARIA HAS SAID, YOU
11:18AM 2 KNOW, THE GOVERNMENT IS NOT TRYING TO LIMIT THEIR PRINCIPLE TO
11:18AM 3 COVID SITUATIONS OR PANDEMIC SITUATIONS.

11:18AM 4 AND TO GIVE THE GOVERNMENT THE RIGHT JUST TO EXTEND THEIR
11:18AM 5 OWN STATUTE OF LIMITATIONS ANY TIME THEY WANT BY FILING A PIECE
11:18AM 6 OF PAPER THAT HAS NO EFFECT NOT EVEN WITH AN AFFIDAVIT ATTACHED
11:18AM 7 TO IT I THINK IS NOT SOMETHING THAT THE COURT SHOULD CONDONE.

11:18AM 8 SO I THINK THE COURT SHOULD GRANT THE MOTION. THANK YOU.

11:18AM 9 THE COURT: ALL RIGHT. THANK YOU.

11:18AM 10 MS. SAHARIA, DO YOU HAVE ANYTHING ELSE TO SAY OR DID
11:18AM 11 MR. COOPERSMITH SPEAK FOR YOU SUCCESSFULLY?

11:18AM 12 MS. SAHARIA: HE SUCCESSFULLY SPOKE FOR ME ON THE
11:18AM 13 SECOND ARGUMENT, AND I APPRECIATE THAT HE READ BRISCOE WHILE I
11:18AM 14 WAS TALKING BECAUSE I COULD NOT DO THAT.

11:18AM 15 BUT LET ME JUST BRIEFLY RESPOND ON THE FIRST ARGUMENT.

11:18AM 16 MS. BAEHR-JONES FOCUSSED ON THE ARGUMENT THAT THE CONDUCT
11:19AM 17 HERE, AS SHE CLAIMS, IS THE SAME BECAUSE IT'S THE SAME SET OF
11:19AM 18 FACTS. THAT TAKES AN EXCEPTIONALLY NARROW VIEW OF WIRE FRAUD,
11:19AM 19 AND IT IS NOT THE VIEW THAT THE GOVERNMENT USUALLY ESPOUSES.

11:19AM 20 I'M SURE THE COURT HAS HAD WIRE FRAUD CASES BEFORE WHERE
11:19AM 21 THE DEFENDANT TRIES A TACTIC OF MOVING TO LIMIT THE
11:19AM 22 INFORMATION -- THE EVIDENCE AT TRIAL ONLY TO THE SPECIFIC
11:19AM 23 MAILING, RIGHT, THE CIRCUMSTANCES AROUND THE SPECIFIC MAILING
11:19AM 24 OR IN THIS CASE THE WIRING, THE VICTIM THAT SENT THE WIRE.

11:19AM 25 AND THE GOVERNMENT'S INEVITABLE RESPONSE IN THOSE CASES IS

11:19AM 1 THAT WIRING IS JUST THE JURISDICTIONAL HOOK AND -- BUT THAT
11:19AM 2 EVIDENCE OF THE ENTIRE SCHEME COMES INTO THE TRIAL.

11:19AM 3 AND THE SCHEME, OF COURSE, CAN EXTEND TO MANY MORE VICTIMS
11:19AM 4 THAN THE ONE VICTIM WHO HAPPENS TO SEND A WIRE. THAT'S HOW THE
11:19AM 5 WIRE FRAUD STATUTE IS WRITTEN. IT'S WRITTEN IN TERMS OF A
11:20AM 6 WIRING FOR PURPOSES OF EXECUTING A SCHEME AND THE WIRING
11:20AM 7 DOESN'T EVEN NECESSARILY NEED TO BE TIED TO A VICTIM. THE
11:20AM 8 WIRING CAN BE ANY WIRING IN FURTHERANCE OF A SCHEME.

11:20AM 9 SO TO SAY THAT THESE COUNTS ARE BASED ON THE SAME SET OF
11:20AM 10 FACTS JUST BECAUSE THE WIRING IS THE SAME IS SIMPLY NOT TRUE
11:20AM 11 WHEN THE -- WE NOW HAVE THREE MORE YEARS OF REPRESENTATIONS
11:20AM 12 THAT ARE PART OF THE SCHEME AND A WHOLE NEW CATEGORY OF VICTIMS
11:20AM 13 THAT ARE PART OF THIS SCHEME.

11:20AM 14 SO THEY'RE NOT BASED ON THE SAME SET OF FACTS. THIS IS
11:20AM 15 NOT A HYPER TECHNICAL READING OF WIRE FRAUD. IT'S THE
11:20AM 16 GOVERNMENT THAT IS TAKING A VERY NARROW READING OF WHAT THE
11:20AM 17 WIRE FRAUD STATUTE PROHIBITS.

11:20AM 18 SO WITH THAT, I'M HAPPY TO REST ON THIS ONE.

11:20AM 19 THE COURT: THANK YOU VERY MUCH. THANK YOU.

11:20AM 20 AGAIN, AS I INDICATED, THE COURT INTENDS TO TAKE EACH OF
11:20AM 21 THESE MOTIONS UNDER SUBMISSION WITH ORDERS TO FOLLOW.

11:20AM 22 LET'S TURN OUR ATTENTION NOW TO 496, LACK OF NOTICE, AS
11:21AM 23 WELL AS 497. I THINK THERE ARE SIMILAR ARGUMENTS HERE AND
11:21AM 24 OVERLAP SHALL I SAY?

11:21AM 25 AND AGAIN, I THINK 500 RELATES TO THIS.

11:21AM 1 SO WHO IS GOING TO SPEAK TO THIS AS THE MOVING PARTY AS TO
11:21AM 2 496?

11:21AM 3 THIS IS MS. HOLMES'S MOTION. 501 IS THE JOINDER BY
11:21AM 4 MR. BALWANI; THE GOVERNMENT'S OPPOSITION IS 522; AND THE REPLY
11:21AM 5 IS 541.

11:21AM 6 WHO WILL SPEAK TO THIS?

11:21AM 7 MS. SAHARIA: YOUR HONOR, I'M GOING TO TURN THE
11:21AM 8 VIRTUAL PODIUM OVER TO MY COLLEAGUE, ANDREW LEMENS.

11:21AM 9 THE COURT: ALL RIGHT. THANK YOU.

11:21AM 10 MR. LEMENS, YOU HEARD ME SAY I'VE READ THE PLEADINGS HERE.
11:21AM 11 AND WHAT IS IT THAT YOU WOULD LIKE ME KNOW THAT WAS NOT
11:21AM 12 CAPTURED IN THE PLEADINGS AS TO THIS MOTION?

11:21AM 13 MR. LEMENS: THANK YOU, YOUR HONOR. GOOD MORNING.

11:21AM 14 I WILL DO MY BEST TO INCORPORATE WHAT MS. SAHARIA AND
11:22AM 15 MR. COOPERSMITH HAVE ARGUED IN THE CONTEXT OF THE PRIOR MOTIONS
11:22AM 16 AS I BELIEVE WE HAVE ADDRESSED ALREADY SOME OF THE ISSUES THAT
11:22AM 17 BEAR HERE.

11:22AM 18 JUST FOR ROADMAPPING, I KNOW YOUR HONOR MENTIONED THESE
11:22AM 19 ARE SIMILAR MOTIONS. I WOULD SUGGEST THAT WE STILL TAKE THEM
11:22AM 20 SEPARATELY AS THE LEGAL DOCTRINES AND ISSUES ARE GOING TO BE
11:22AM 21 SOMEWHAT DIFFERENT.

11:22AM 22 I WOULD PROPOSE TO START WITH THE NOTICE MOTION, WHICH IS
11:22AM 23 496.

11:22AM 24 THE COURT: RIGHT. THAT'S WHAT I'D LIKE TO DO AS
11:22AM 25 WELL.

1 MR. LEMENS: WE'VE TALKED THIS MORNING ABOUT HOW THE
2 INDICTMENT WAS EXPANDED THIS PAST SUMMER, AND I THINK IT'S
3 IMPORTANT -- YOU KNOW, WE HAVE TALKED ALSO ABOUT WALGREENS AND
4 SAFEWAY BEING MOVED IN AND THE BOARD MEMBERS BEING MOVED IN.

5 AND FOR THE PURPOSES OF CONSTITUTIONAL NOTICE THE
6 QUESTION WE'RE ASKING IS WHAT IS AVAILABLE TO THE DEFENSE ON
7 THE FACE OF THE INDICTMENT? AND I THINK IT'S IMPORTANT TO
8 DISTINGUISH WHAT IS IN THE INDICTMENT ITSELF AS COMPARED TO
9 WHAT THE GOVERNMENT HAS EXPLAINED IN POST INDICTMENT
10 CORRESPONDENCE AND IN PLEADINGS TO THIS COURT.

11 THE INDICTMENT SAYS INVESTORS AND ADDS A PARENTHETICAL
12 THAT REFERS TO BUSINESS PARTNERS AND BOARD MEMBERS.

13 IT DOESN'T DISCUSS HOW THOSE BOARD MEMBERS OR BUSINESS
14 PARTNERS ARE ALLEGED TO HAVE INVESTED IN THERANOS. IT DOESN'T
15 PROVIDE THE GOVERNMENT'S THEORY OF THE ALLEGED DEPRIVATION OF
16 PROPERTY, IT DOESN'T PROVIDE ANY EXPLANATION AS TO HOW THOSE
17 NEW GROUPS WHO ARE DIFFERENT THAN THE OUTSIDE INVESTORS THAT
18 ARE MENTIONED IN THE SUBSTANTIVE COUNTS AND THE OUTSIDE
19 INVESTORS THAT WE SPOKE ABOUT IN THE PRIOR MOTIONS PRACTICE ARE
20 HANDLED.

21 AND I THINK THIS CREATES NOTICE ISSUES AS TO THE UNIVERSE
22 OF STATEMENTS AT ISSUE; AS TO WHAT, WHAT TRANSACTION OCCURRED,
23 WHAT TRANSACTION IS ALLEGED TO HAVE OCCURRED; AND THEN FINALLY,
24 AS TO THE DUTY TO DISCLOSE. THESE ARE DIFFERENTLY SITUATED
25 GROUPS. THEY HAVE DIFFERENT RELATIONSHIPS TO THE COMPANY. SO

1 IT CREATES A QUESTION AS TO WHAT IS THE DUTY THE GOVERNMENT
2 ALLEGES?

3 AND NONE OF THAT IS IN THE FACE OF THE INDICTMENT. NONE
4 OF THAT IS AVAILABLE FROM THE INDICTMENT.

5 AND THEN FOR THAT REASON THERE'S A DEFICIENCY AND IN OUR
6 POSITION WOULD REQUIRE DISMISSAL.

7 I THINK WHERE WE'RE GOING TO GO QUICKLY IS THE QUESTION OF
8 THE BILL OF PARTICULARS. AND WE RECOGNIZE AND AGREE THAT THE
9 GOVERNMENT HAS MADE A NUMBER OF REPRESENTATIONS SINCE THE
10 INDICTMENT WAS FILED. I THINK THOSE REPRESENTATIONS NEED TO BE
11 DOCUMENTED IN A BILL OF PARTICULARS TO GIVE THEM LEGAL EFFECT
12 SO WE HAVE CLARITY ON THE ISSUES AS WE MOVE TO TRIAL.

13 BUT I -- THERE'S STILL OUTSTANDING QUESTIONS THAT REMAIN.
14 AND I THINK WHEN YOU LOOK AT WHAT THEY'VE TOLD US ABOUT THE
15 BUSINESS PARTNERS AS COMPARED TO WHAT HAS BEEN EXPLAINED ABOUT
16 THE BOARD MEMBERS YOU CAN SEE, SEE THE DIFFERENCE.

17 WITH THE BUSINESS PARTNERS, THE GOVERNMENT HAS BEEN CLEAR.
18 THEY HAVE SAID WE'RE REFERRING ONLY TO WALGREENS AND SAFEWAY.

19 TO THE EXTENT THAT THERANOS HAD OTHER BUSINESS PARTNERS OR
20 OTHER POTENTIAL RELATIONSHIPS, THAT'S NOT WHAT THE INDICTMENT
21 REFERS TO.

22 AND THEY'VE POINTED MS. HOLMES AND MR. BALWANI TO VERY
23 SPECIFIC TRANSACTIONS THAT THEY ALLEGE CONSTITUTE -- THAT ARE
24 AT ISSUE HERE, TRANSACTIONS IN 2011 AND 2012, IN BOTH CASES
25 CONVERTIBLE NOTES, THE ISSUANCE OF CONVERTIBLE NOTES THAT

11:25AM 1 PROVIDED A DEBT OR SECURITY INTEREST TO WALGREENS AND SAFEWAY.

11:25AM 2 I THINK WE HAVE TO CONCEDE THAT GIVES US -- THAT
11:25AM 3 INFORMATION, IF PROPERLY REFLECTED IN A BILL OF PARTICULARS,
11:25AM 4 GETS US STARTED ON UNDERSTANDING WHAT THE GOVERNMENT'S THEORY
11:25AM 5 IS.

11:25AM 6 WITH THE BOARD MEMBERS BY CONTRAST, THERE'S STILL NOT A
11:26AM 7 CLEAR PRINCIPLE OR ARTICULABLE AREA AS TO WHAT INVESTMENT, WHAT
11:26AM 8 INVESTMENT OCCURRED.

11:26AM 9 IN ONE OPPOSITION THEY HAVE IDENTIFIED TWO DIRECTORS.
11:26AM 10 THOSE ARE DIRECTORS WHO MADE INDEPENDENT STANDALONE INVESTMENTS
11:26AM 11 THAT HAD NOTHING TO DO WITH THEIR BOARD SERVICE. SO THE
11:26AM 12 QUESTION BECOMES IS THAT WHAT THE GOVERNMENT IS REFERRING TO
11:26AM 13 WHEN IT REFERS TO BOARD MEMBERS? IS IT THOSE BOARD MEMBERS WHO
11:26AM 14 MADE SEPARATE INVESTMENTS?

11:26AM 15 IN THE OPPOSITION TO THE NOTICE MOTION, THEY POINT TO US,
11:26AM 16 AS YOUR HONOR MENTIONED EARLIER, TO THE SHAREHOLDER LIST. AND
11:26AM 17 I THINK AS THAT LIST MAKES CLEAR AND BASED ON OUR UNDERSTANDING
11:26AM 18 OF THE FACTS THAT LIST INCLUDES SHARES THAT WERE GRANTED TO
11:26AM 19 BOARD MEMBERS AS COMPENSATION.

11:26AM 20 SO THE QUESTION BECOMES DOES THE GOVERNMENT'S THEORY
11:26AM 21 INCLUDE THOSE TRANSACTIONS AS WELL? BECAUSE THOSE ARE OF A
11:26AM 22 VERY DIFFERENT KIND, AND I THINK THAT WILL CREATE ISSUES THAT
11:27AM 23 WE WILL NEED TO DISCUSS IN THE CONTEXT OF DUPLICITY.

11:27AM 24 SO THERE REMAIN SOME OUTSTANDING QUESTIONS WITH RESPECT TO
11:27AM 25 THE BOARD MEMBERS, AND THE GOVERNMENT ARTFULLY REFUSES TO

11:27AM 1 PROVIDE THE CLARITY THAT WE BELIEVE THE DEFENSE IS ENTITLED TO.

11:27AM 2 THE COURT: SO IS IT THAT -- MR. LEMENS, IT SOUNDS
11:27AM 3 LIKE THE DEFENSE WOULD HAVE GREATER COMFORT IF YOU KNEW AS TO
11:27AM 4 THE BOARD MEMBERS IF THE GOVERNMENT COULD ANSWER THE QUESTIONS
11:27AM 5 AS INVESTORS ARE THEY REFERRING TO AND WILL THEY PUT EVIDENCE
11:27AM 6 IN THAT THESE INVESTORS ARE INVESTORS WHO PURCHASED INTERESTS
11:27AM 7 IN THERANOS SECURITIES AND THERANOS BASED ON
11:27AM 8 MISREPRESENTATIONS, ET CETERA, ET CETERA, AS OPPOSED TO, AS WE
11:27AM 9 DISCUSSED EARLIER, BOARD MEMBERS WHO RECEIVED SECURITIES BY
11:27AM 10 VIRTUE OF THEIR SERVICE AND WHO MADE NO MONETARY INVESTMENT,
11:28AM 11 THEY DIDN'T BUY THE SECURITIES, THEY DIDN'T WIRE.

11:28AM 12 I THINK SOME OF THESE COUNTS, AS THE GOVERNMENT POINTS
11:28AM 13 OUT, IT SHOULD BE PRETTY, PRETTY CLEAR TO FOLLOW THERE ARE
11:28AM 14 ACTUAL WIRES OF DIFFERENT SUMS, LARGE SUMS OF MONEY, MILLIONS
11:28AM 15 OF DOLLARS IN SOME CASES, TO PURCHASE SECURITIES. AND THERE'S
11:28AM 16 A WIRE TRACK THAT SHOWS THAT. THOSE PEOPLE, THOSE INVESTORS, I
11:28AM 17 THINK, ARE EASILY IDENTIFIABLE, AREN'T THEY, TO YOU?

11:28AM 18 MR. LEMENS: I THINK, THEY ARE, YOUR HONOR, I THINK
11:28AM 19 FROM MY ROLE ONLY REPRESENT MY REVIEW OF THE DOCUMENT THAT THE
11:28AM 20 GOVERNMENT HAS POINTED TO. I THINK WE COULD GET SOMEWHERE WITH
11:28AM 21 THAT.

11:28AM 22 I THINK JUST TO PROVIDE A LITTLE FURTHER CLARITY, I THINK
11:28AM 23 THERE ARE THREE GROUPS OF BOARD MEMBERS WE'RE WONDERING ABOUT.
11:28AM 24 THE FIRST IS, AS YOUR HONOR REFERRED TO, THOSE INVESTORS WHO
11:28AM 25 MADE SEPARATE INVESTMENTS, WHO MADE A WIRE UNRELATED TO THEIR

11:29AM 1 BOARD SERVICE AND IN EXCHANGE RECEIVED SHARES. THAT'S ON ONE
11:29AM 2 END OF THE SPECTRUM.

11:29AM 3 ON THE OTHER END OF THE SPECTRUM THERE ARE, FROM OUR
11:29AM 4 UNDERSTANDING, BOARD MEMBERS WHO RECEIVED SHARES AS
11:29AM 5 COMPENSATION, IN LIEU OF COMPENSATION.

11:29AM 6 AND THEN THERE'S A GROUP IN THE MIDDLE WHO -- WHERE THERE
11:29AM 7 WAS AN OPTION. THEY RECEIVED AN OPTION TO ACQUIRE SHARES.

11:29AM 8 THE COURT: FOR CASH PURCHASE OR FOR BOARD SERVICE?

11:29AM 9 MR. LEMENS: FOR -- IN LIEU OF COMPENSATION OR AS
11:29AM 10 PART OF THEIR COMPENSATION PACKAGE FOR THEIR SERVICE ON THE
11:29AM 11 BOARD. I THINK THAT'S OUR UNDERSTANDING.

11:29AM 12 AND IF THE GOVERNMENT WERE TO PROVIDE CLARITY AS TO WHICH
11:29AM 13 OF THOSE GROUPS WERE INCLUDED AND WHY, WHAT IS THE THEORY OF
11:29AM 14 WIRE FRAUD WITH RESPECT TO EACH OF THOSE GROUPS, I THINK WE
11:29AM 15 WOULD BE IN A BETTER POSITION.

11:29AM 16 THE COURT: SURE. SO THE INDICTMENT DOES NOT
11:29AM 17 REFLECT ANY WIRE TRANSFERS WITH REGARD TO THOSE LAST TWO
11:29AM 18 CATEGORIES THAT YOU'VE TALKED ABOUT, THAT IS, BOARD
11:29AM 19 COMPENSATION. THERE'S NOTHING IN THE INDICTMENT THAT
11:29AM 20 REFERENCES A WIRE TRANSFER FOR THE SECURING OF THOSE SECURITIES
11:30AM 21 AS I UNDERSTAND IT.

11:30AM 22 MR. LEMENS: IF THERE IS ONE, I'M SURE THE
11:30AM 23 GOVERNMENT WILL POINT US TO IT, BUT WE HAVE BEEN UNABLE TO SEE
11:30AM 24 ONE. AND WE HAVE REVIEWED THIS CAREFULLY.

11:30AM 25 THE COURT: AND I'M JUST CURIOUS WHY THAT DOESN'T

11:30AM 1 ANSWER THAT INITIAL QUESTION. IF IT'S NOT THERE, IT'S NOT
11:30AM 2 THERE. THEY'RE FOCUSING ON THE INVESTORS THEMSELVES.

11:30AM 3 SO -- BUT WE'LL ASK THE GOVERNMENT. I UNDERSTAND WHY
11:30AM 4 YOU'RE SAYING, GEE, A BILL OF PARTICULARS WOULD REALLY HELP US
11:30AM 5 IN THIS REGARD.

11:30AM 6 THERE WAS THAT APRIL, EARLY APRIL -- WAS IT APRIL 14TH?
11:30AM 7 THERE WAS A -- I THINK THAT THE GOVERNMENT RECEIVED A DRAFT OF
11:30AM 8 THE INFORMATION, AND IT WASN'T UNTIL SOME WEEKS LATER, SOME
11:30AM 9 TIME IN MAY, I'M INFORMED THROUGH THE PLEADINGS, THAT THE
11:30AM 10 DEFENSE ACTUALLY RECEIVED SOME CLARITY FROM THE GOVERNMENT AS
11:30AM 11 TO WHAT THEY MEANT BY INVESTORS.

11:30AM 12 MR. LEMENS: YEAH. I BELIEVE THE TIMING,
11:31AM 13 YOUR HONOR, IS THAT WE RECEIVED NOTICE WHEN WE FIRST RECEIVED
11:31AM 14 THE DRAFT INFORMATION IN APRIL. IT WAS SHORTLY BEFORE WE FILED
11:31AM 15 THIS MOTION IN AUGUST WITHIN MAYBE THE WEEK OR TEN DAYS PRIOR
11:31AM 16 THAT WE RECEIVED THE FIRST ROUND OF CLARIFICATION.

11:31AM 17 AND THE -- AND THERE HAVE BEEN FURTHER CLARIFICATIONS AS
11:31AM 18 THE GOVERNMENT HAS FILED ITS BRIEFS WITH RESPECT TO THESE
11:31AM 19 MOTIONS.

11:31AM 20 SO I, I DON'T WANT TO SAY THAT THEY HAVEN'T SAID ANYTHING,
11:31AM 21 BUT I THINK OUR POSITION IS THAT WE HAVEN'T GOTTEN SUFFICIENT
11:31AM 22 CLARITY, AND THOSE REPRESENTATIONS NEED TO BE DOCUMENTED IN A
11:31AM 23 BILL OF PARTICULARS TO GIVE THEM THE NECESSARY LEGAL EFFECT.

11:31AM 24 THE COURT: IS IT ALSO APPROPRIATE OR WOULD IT ALSO
11:31AM 25 BE A REMEDY TO -- I LOOK AT THIS AND I THINK, WELL, ARE YOU

11:31AM 1 SAYING THAT THE GOVERNMENT SHOULD MAKE AN ELECTION? AND IF SO,
11:31AM 2 WHEN SHOULD THAT ELECTION BE? AND ISN'T THIS SOMETHING THAT
11:31AM 3 CAN BE RESOLVED IN LIMINE?

11:31AM 4 IN OTHER WORDS, YOU'LL ASK FOR A LIMITATION ON WHAT
11:31AM 5 EVIDENCE IS GOING TO BE PROVIDED AND THE RELEVANCE OR
11:32AM 6 MATERIALITY OF ANYTHING THAT EXCEEDS THAT.

11:32AM 7 OR IS THAT TOO LONG OF A WAIT TO ANSWER THE QUESTION FOR
11:32AM 8 YOU? IS THAT TOO LONG OF A WAIT?

11:32AM 9 MR. LEMENS: WELL, I DARE SAY THAT WE NEED A LITTLE
11:32AM 10 CLARITY TO INFORM WHAT THOSE MOTIONS WOULD LOOK LIKE.

11:32AM 11 IF THE GOVERNMENT IS PURSUING AN OPTIONS AS COMPENSATION
11:32AM 12 THEORY OF FRAUD, I THINK WE'LL, WE'LL HAVE SOME DISCUSSIONS
11:32AM 13 AROUND WHAT MOTIONS, IF ANY, ARE NECESSARY AS YOUR HONOR
11:32AM 14 REFERENCES EITHER IN LIMINE OR AT SOME OTHER POINT IN TIME.

11:32AM 15 BUT WE DON'T KNOW WHAT THE THEORY IS AT THIS POINT. SO
11:32AM 16 IT'S VERY DIFFICULT TO SPECULATE AS TO HOW WE WOULD LITIGATE
11:32AM 17 THAT DOWN THE ROAD.

11:32AM 18 THE COURT: SO LET ME ASK YOU THE QUESTION, AND
11:32AM 19 MAYBE YOU'LL, MAYBE YOU'LL -- YOU CAN ANSWER IT OR WHOEVER IS
11:32AM 20 GOING TO TALK ABOUT THE DUPLICITOUS. IS THERE A DISTINCTION
11:32AM 21 BETWEEN AN INVESTOR AND A BUSINESS PARTNER? CAN'T ONE BE THE
11:33AM 22 SAME, BE A BUSINESS PARTNER AND AN INVESTOR?

11:33AM 23 MR. LEMENS: I THINK IF THERE WAS AN ALLEGATION THAT
11:33AM 24 A BUSINESS PARTNER HAD MADE AN INVESTMENT, I DON'T THINK WE
11:33AM 25 WOULD QUIBBLE OVER THE USE OF THE WORD "INVESTOR."

1 I THINK IN THIS -- AND I WILL ALSO BE ADDRESSING THE
2 DUPLICITY MOTION, AND WE'RE HEADING INTO THAT TERRITORY, I
3 THINK IT DEPENDS VERY MUCH ON HOW THE SCHEMES ARE DEFINED AND
4 IN OUR VIEW IT'S NOT JUST ENOUGH TO PUT THE INVESTOR LABEL ON
5 ALL OF THESE ENTITIES AND SAY THAT'S ENOUGH TO AVOID A
6 DUPLICITY CHARGE BECAUSE YOU HAVE TO LOOK AT HOW -- WHAT THE
7 TRANSACTIONS ARE, THE NATURE OF THE TRANSACTIONS, THE NATURE OF
8 THE INTERACTIONS WITH THOSE PARTICULAR PARTIES.

9 THERANOS'S INTERACTIONS WITH WALGREENS AND SAFEWAY
10 DIFFERED SIGNIFICANTLY, BOTH IN TIME AND THE NATURE OF THE
11 CONVERSATION AND IN THE UNDERLYING CONTRACTUAL RELATIONSHIP
12 FROM --

13 THE COURT: BUT THE, BUT THE -- I'M SORRY TO
14 INTERRUPT YOU, MR. LEMENS.

15 BUT THE POINT IS THAT BOTH OF THOSE CORPORATIONS WERE
16 BUSINESS PARTNERS, THEY WERE PART OF A PLAN TO DO SOME BUSINESS
17 IN ADVANCE OF BUSINESS, BUT THEY WERE ALSO GIVEN, AS I
18 UNDERSTAND IT, OPTIONS TO PURCHASE SECURITIES IN THE COMPANY.

19 AND IF I'M NOT MISTAKEN, THEY ACTUALLY DID TRANSFER
20 SIGNIFICANT SUMS OF DOLLARS FOR THE PURCHASE OF THOSE
21 SECURITIES.

22 DOES THAT MAKE THEM AN INVESTOR?

23 MR. LEMENS: I THINK IT'S CORRECT TO SAY THAT THEY
24 HAD A CONVERTIBLE NOTE THAT AT SOME POINT IN THE FUTURE COULD
25 BE CONVERTED INTO EQUITY.

11:34AM 1 NEITHER OF THOSE ENTITIES APPEAR ON THE SHAREHOLDER'S
11:34AM 2 LIST, SO NEITHER OF THEM HELD SHARES, NEITHER OF THEM WERE
11:34AM 3 EQUITY SHAREHOLDERS LIKE THE INVESTORS IN THE INDICTMENT.

11:34AM 4 AND THE NOTES THEMSELVES, I THINK IF WE WERE TO GET INTO
11:34AM 5 THE DETAILS, ARE VERY DIFFERENT. THERE ARE CONDITIONS ON
11:35AM 6 EXERCISE, THERE ARE TERMINATION RIGHTS, THERE'S A -- YOU KNOW,
11:35AM 7 THE GOVERNMENT ATTACHED -- YOU KNOW, THE AGREEMENTS THEMSELVES,
11:35AM 8 THEY'RE DENSE EXTENDED CONTRACTS THAT DEFINE THAT RELATIONSHIP.
11:35AM 9 AND IT BECOMES -- YOU KNOW, WHEN YOU START TO LOOK IN AND LOOK
11:35AM 10 AT THE DETAILS, THEY ARE VERY DIFFERENT THAN THE OUTSIDE
11:35AM 11 INVESTORS WHO ARE IDENTIFIED IN THE PRIOR INDICTMENT WHO SIMPLY
11:35AM 12 GAVE MONEY AND TOOK EQUITY IN THAT NORMAL UNDERSTANDING OF
11:35AM 13 INVESTOR.

11:35AM 14 THE COURT: RIGHT. IT'S A DIFFERENT TYPE OF
11:35AM 15 INVESTMENT, I AGREE. I THINK THAT'S WHAT WE'VE LEARNED.

11:35AM 16 BUT IT'S AN INVESTMENT NONETHELESS, IS IT?

11:35AM 17 MR. LEMENS: I THINK YOU'RE RIGHT THAT IT'S A
11:35AM 18 DIFFERENT, AND WE WOULD SAY A SIGNIFICANTLY DIFFERENT, TYPE OF
11:35AM 19 INVESTMENT AND TYPE OF RELATIONSHIP.

11:35AM 20 THE COURT: OKAY. OKAY. ALL RIGHT. THANK YOU.

11:35AM 21 MR. LEMENS: IF I MIGHT MAKE JUST ONE POINT,
11:35AM 22 YOUR HONOR?

11:35AM 23 THE COURT: SURE.

11:35AM 24 MR. LEMENS: I THINK THE NATURE, WHILE WE'RE IN THE
11:36AM 25 NOTICE REALM, THE NATURE OF THE CHANGE, THE BOARD MEMBERS AND

1 BUSINESS PARTNERS, IN ADDITION TO LEARNING A LITTLE BIT MORE
2 ABOUT WHAT THIS THEORY IS, THE STATEMENTS THAT ARE ALLEGED TO
3 BE MADE FOR THE PURPOSES OF SOLICITING THOSE INVESTMENTS IS
4 IMPORTANT FOR THE GOVERNMENT TO DISCLOSE.

5 WALGREENS AND SAFEWAY RECEIVED HUNDREDS IF NOT THOUSANDS
6 OF STATEMENTS AND HAD NUMEROUS INTERACTIONS WITH THE COMPANY
7 THAT HAD NOTHING TO DO WITH THE, THE EARLY TRANSACTIONS THAT
8 THE GOVERNMENT HAS IDENTIFIED. AND I THINK THE BOARD MEMBERS,
9 IT SHOULD BE VERY OBVIOUS AS TO THE NATURE OF THAT
10 RELATIONSHIP, WENT MUCH FARTHER THAN JUST SOLICITING AN
11 INVESTMENT AND LIKEWISE, FOR THE GOVERNMENT TO IDENTIFY THE
12 DUTY TO DISCLOSE THEORY IT WOULD PURSUE.

13 THE COURT: WELL, THAT'S NEXT, ISN'T IT, TO TALK
14 ABOUT THAT. DO YOU WANT TO MENTION THAT NOW?

15 MR. LEMENS: ONLY TO THE EXTENT THAT IF THAT IS, IF
16 THAT IS STILL ON THE TABLE, IT'S SOMETHING THAT SHOULD BE
17 CLARIFIED BECAUSE I DON'T THINK THAT YOU CAN SAY WALGREENS,
18 SAFEWAY, AND THE BOARD MEMBERS HAD THIS SAME DUTY AS OUTSIDE
19 INVESTORS TO THE EXTENT THAT IT DID.

20 THE COURT: OKAY. AND I'M CURIOUS ALSO, MY COMMENT
21 ABOUT WHETHER OR NOT THAT -- THIS DUTY TO DISCLOSE THEN,
22 WHETHER THERE WAS A DUTY TO DISCLOSE, WHETHER THAT'S SOMETHING
23 THAT WOULD COME UP DURING TRIAL, DURING IN LIMINES? IS THAT A
24 RULE 29 ISSUE?

25 I KNOW THERE'S SOME CASE LAW IN THIS DISTRICT ABOUT THAT.

11:37AM 1 IT'S A FACTUAL DETERMINATION, ISN'T IT? AND PERHAPS THAT IS
11:37AM 2 BEST PLACED IN A JURY INSTRUCTION FOLLOWING IN LIMINE MOTIONS.

11:37AM 3 MR. LEMENS: AGAIN, YOUR HONOR, I THINK WE'RE IN THE
11:37AM 4 SAME PLACE WHERE ONCE WE KNOW WHAT THE DUTY IS ALLEGED TO BE,
11:37AM 5 WE CAN ADDRESS THE LEGAL SUFFICIENCY.

11:37AM 6 THE COURT: OKAY. ALL RIGHT. THANK YOU.

11:37AM 7 LET ME TURN TO MR. BALWANI'S TEAM. ANYBODY THAT NEEDS TO
11:38AM 8 OFFER ANYTHING BEFORE I TURN TO THE GOVERNMENT?

11:38AM 9 I DON'T SEE ANY HANDS RAISED.

11:38AM 10 WELL, LET'S TURN --

11:38AM 11 MR. COOPERSMITH: WELL, YOUR HONOR, ONE QUICK THING.

11:38AM 12 THE COURT: YES, MR. COOPERSMITH.

11:38AM 13 MR. COOPERSMITH: YES. JUST TO POINT OUT ONE QUICK
11:38AM 14 THING, AND IT'S IN THE BRIEFS SO THE COURT HAS THAT. BUT OUR
11:38AM 15 UNDERSTANDING OF THE FACTS IS THAT AS TO WALGREENS AND SAFEWAY
11:38AM 16 THEY DIDN'T ACTUALLY BUY ANY EQUITY OR EXECUTE NOTES. SO I
11:38AM 17 JUST WANTED TO POINT THAT OUT.

11:38AM 18 THE COURT: OKAY. ALL RIGHT. THANK YOU.

11:38AM 19 MR. BOSTIC, ARE YOU SPEAKING TO 496 ON BEHALF OF THE
11:38AM 20 GOVERNMENT?

11:38AM 21 MR. BOSTIC: I AM, YOUR HONOR. THANK YOU AND GOOD
11:38AM 22 MORNING.

11:38AM 23 THE COURT: GOOD MORNING.

11:38AM 24 MR. BOSTIC: I THINK AS AN INITIAL MATTER, JUST TO
11:38AM 25 PUT THIS ALL IN CONTEXT, WE SHOULD START WITH THE LANGUAGE IN

11:38AM 1 THE INDICTMENT THAT HAS LED TO THIS DISPUTE.

11:38AM 2 THIS IS ALL RELATING TO ONE SENTENCE IN PARAGRAPH 3 OF THE
11:38AM 3 THIRD SUPERSEDING INDICTMENT. THAT PARAGRAPH IS PROVIDING SOME
11:38AM 4 PRELIMINARY FACTS ABOUT THERANOS, WHERE IT WAS INCORPORATED,
11:38AM 5 WHERE IT DID ITS BANKING, AND THEN IT SAYS IT ALSO RECEIVED
11:39AM 6 FINANCIAL INVESTMENTS FROM INVESTORS.

11:39AM 7 IT THEN SAYS, "THERANOS'S INVESTORS INCLUDED INDIVIDUALS,
11:39AM 8 ENTITIES, CERTAIN BUSINESS PARTNERS, MEMBERS OF ITS BOARD OF
11:39AM 9 DIRECTORS AND INDIVIDUALS AND ENTITIES WHO INVESTED THROUGH
11:39AM 10 FIRMS FORMED FOR THAT EXCLUSIVE PURPOSE."

11:39AM 11 THE DEFENSE READS THIS LANGUAGE AS A NEW DEFINITION OR A
11:39AM 12 SPECIALIZED DEFINITION OF "INVESTORS," BUT THAT IS SIMPLY NOT
11:39AM 13 THE CASE.

11:39AM 14 AND IN MAKING THAT ARGUMENT, THEY RELY ON SEMANTIC POINTS
11:39AM 15 ABOUT HOW THEY VIEW THAT LANGUAGE. THEY ALSO RELY ON PREVIOUS
11:39AM 16 REPRESENTATIONS BY THE GOVERNMENT AND THINGS THAT HAVE BEEN
11:39AM 17 DISCLOSED IN BRIEFING.

11:39AM 18 BUT AS THE COURT HAS PREVIOUSLY RECOGNIZED, WHEN JUDGING
11:39AM 19 THE SUFFICIENCY OF AN INDICTMENT, WE'RE LIMITED TO THE FOUR
11:39AM 20 CORNERS.

11:39AM 21 AND WHEN WE LOOK AT THE LANGUAGE ITSELF, IT SIMPLY DOESN'T
11:39AM 22 PURPORT TO DO WHAT THE DEFENDANTS CLAIM IT DOES. IT DOES NOT
11:39AM 23 CHANGE THE DEFINITION OF "INVESTORS." INSTEAD, IT SAYS THAT
11:40AM 24 THERANOS HAD INVESTORS. AND WHEN LOOKING AT THE LIST OF
11:40AM 25 THERANOS INVESTORS, YOU WILL SEE THE FOLLOWING. YOU WILL SEE

1 INDIVIDUALS, YOU WILL SEE ENTITIES, YOU WILL SEE BUSINESS
2 PARTNERS, MEMBERS OF ITS BOARD OF DIRECTORS AND SO ON.

3 IT'S SIMPLY MAKING EXPLICIT THAT THOSE DIFFERENT TYPE OF
4 ENTITIES WERE INCLUDED IN THE INDIVIDUALS AND ENTITIES WHO
5 INVESTED IN THERANOS.

6 IT DOESN'T MEAN THAT AS TO ANY BUSINESS PARTNER OR ANY
7 BOARD OF DIRECTORS MEMBER THE DEFENSE IS LEFT TO GUESS AS TO
8 WHETHER THAT PERSON OR ENTITY IS AN INVESTOR. INVESTOR STILL
9 MEANS INVESTOR. THEY'RE NOT LEFT TO GUESS IN THE SAME WAY THAT
10 THEY'RE NOT LEFT TO GUESS WHETHER ANY INDIVIDUAL OR ENTITY IN
11 THE WORLD MIGHT QUALIFY AS A THERANOS INVESTOR.

12 WHEN THE DEFENSE TRIES TO READ IN NARROWER READING OF THE
13 TERM "INVESTOR" TO SAY, FOR EXAMPLE, THAT INVESTOR NEEDS TO BE
14 AN OUTSIDE INVESTOR, IT NEEDS TO BE AN INDIVIDUAL OR AN ENTITY
15 WHO ONLY HAD AN INVESTOR RELATIONSHIP WITH THERANOS, IT NEEDED
16 TO BE AN ARMS LENGTH TRANSACTION.

17 WELL, NOW WE HAVE THE DEFENSE WHO ACTUALLY IS THE ONE
18 TRYING TO READ IN A SPECIALIZED, A NARROWER, A DIFFERENT
19 DEFINITION OF THAT TERM "INVESTOR."

20 SO THE REASON THAT THE DEFENSE'S ARGUMENTS ULTIMATELY LACK
21 MERIT, THE REASON THAT A BILL OF PARTICULARS IS NOT NECESSARY,
22 AND THE REASON THAT THE GOVERNMENT HASN'T PROVIDED A MORE
23 COMPLEX DEFINITION OF INVESTORS IN CONNECTION WITH THE
24 INDICTMENT IS THAT THERE IS NO MORE COMPLEX DEFINITION.
25 INVESTORS MEANS INDIVIDUALS WHO PAID MONEY AND IN EXCHANGE

1 RECEIVED THERANOS SECURITIES, AND THAT'S THE DEFINITION
2 PROVIDED IN THE GOVERNMENT'S BRIEFING. THAT WOULD BE A NORMAL
3 DEFINITION OF THE TERM, AND THAT DEFINITION INCLUDES
4 INDIVIDUALS, ENTITIES, BUSINESS PARTNERS, WALGREENS AND
5 SAFEWAY, AS WELL AS CERTAIN MEMBERS OF THE BOARD OF DIRECTORS.

6 THE COURT: I APPRECIATE, MR. BOSTIC, THE DEFENSE
7 MIGHT BE A LITTLE UNEASY OR INSECURE IN RECOGNIZING THAT WE
8 LOOKED AT THIS INDICTMENT THROUGH ONE LENS AND NOW IN ITS THIRD
9 ITERATION THE GOVERNMENT IS ALLEGED THIS NEW RELATIONSHIP, FROM
10 THEIR EYES A NEW RELATIONSHIP, BETWEEN WALGREENS AND SAFEWAY,
11 AND THAT'S SOMETHING THAT WE HADN'T REALIZED BEFORE.

12 WE BETTER -- THE BASIS OF THIS MOTION IS LET'S GET
13 DEFINITIONS OF WHO THE PARTIES REALLY ARE BEFORE WE GO FORWARD
14 BECAUSE WE DON'T WANT TO FACE THIS ISSUE AGAIN.

15 I GUESS THEY SUGGEST THAT THE LANGUAGE IN THE INDICTMENT
16 IS BROAD ENOUGH THAT THE GOVERNMENT COULD, AND I'M NOT
17 SUGGESTING YOU WOULD OR THAT THIS WOULD HAPPEN, BUT MY SENSE IS
18 THAT THEY'RE CONCERNED ABOUT SURPRISE THAT THERE MIGHT BE OTHER
19 ENTITIES WHO WOULD BE INCLUDED UNDER THE UMBRELLA OF INVESTORS
20 OR BUSINESS PARTNERS.

21 AND MY SENSE IS THAT THIS TEAM, THIS DEFENSE TEAM IS UP TO
22 THE CHALLENGE. THEY JUST WANT TO KNOW WHAT IS THE LINEUP ON
23 THE OTHER SIDE OF THE ICE SO THAT THEY CAN PROPERLY PREPARE.

24 MR. BOSTIC: AND WE'RE CERTAINLY NOT LOOKING TO
25 SURPRISE THE DEFENSE AT TRIAL, YOUR HONOR. WE'RE TRYING TO BE

11:43AM 1 TRANSPARENT, BUT I THINK THE DEFENSE IS OVERTHINKING IT. TO AN
11:43AM 2 EXTENT THAT'S THEIR JOB.

11:43AM 3 BUT I THINK TO THE EXTENT THAT THEY VIEWED "INVESTORS" AS
11:43AM 4 OVERLY NARROW BEFORE THE INDICTMENT INCLUDED THIS ADDITIONAL
11:43AM 5 CLARIFICATION, TO THE EXTENT THEY HAD A NARROW DEFINITION OF
11:43AM 6 INVESTORS, I THINK THAT WAS BASED ON A MISINTERPRETATION OF THE
11:43AM 7 INFORMATION PROVIDED BY THE GOVERNMENT.

11:43AM 8 FOR EXAMPLE, AS I THINK THE COURT HAS NOTED, THERE'S NO
11:43AM 9 REASON WHY AN ENTITY DESCRIBED BY THE GOVERNMENT AS A BUSINESS
11:43AM 10 PARTNER CANNOT ALSO BE AN INVESTOR. THAT'S NOT HOW LOGIC
11:43AM 11 WORKS.

11:44AM 12 BUT I THINK THE DEFENSE POSSIBLY MADE AN ERROR IN TAKING A
11:44AM 13 NARROW VIEW OF WHAT THAT TERM WOULD MEAN, ASSUMING THAT IF THE
11:44AM 14 GOVERNMENT DESCRIBED AN ENTITY AS A BUSINESS PARTNER, THAT IT
11:44AM 15 COULD NOT ALSO BE AN INVESTOR, BUT THAT'S NOT THE CASE.

11:44AM 16 WHETHER A GIVEN PARTY IS, IN FACT, AN INVESTOR OR NOT IS A
11:44AM 17 FACTUAL QUESTION. AND THE GOVERNMENT HAS PROVIDED THE EVIDENCE
11:44AM 18 TO THE DEFENSE THAT THEY NEED TO MAKE THAT DETERMINATION, AND
11:44AM 19 THE GOVERNMENT HAS HIGHLIGHTED IT IN THE BRIEFS AS WELL.

11:44AM 20 SO TO THE GOVERNMENT'S KNOWLEDGE WHEN WE'RE LOOKING AT WHO
11:44AM 21 WERE THE ACTUAL VICTIMS OF THE SCHEME TO DEFRAUD INVESTORS,
11:44AM 22 THAT'S GOING TO BE INDIVIDUALS AND ENTITIES WHO PAID MONEY AND
11:44AM 23 RECEIVED SECURITIES. THAT INCLUDES THE INDIVIDUALS ON THE
11:44AM 24 THERANOS STOCK LEDGER. IT ALSO INCLUDES SAFEWAY AND WALGREENS
11:44AM 25 WHO DID PAY LARGE SUMS OF MONEY, AS THE COURT NOTED, AND

1 RECEIVED THERANOS SECURITIES IN RETURN. THERE'S NO REASON WHY
2 THEY SHOULD NOT BE INCLUDED IN THAT DEFINITION.

3 AND ALTHOUGH THEY HAD DIFFERENT RELATIONSHIPS WITH
4 THERANOS IN ADDITION TO THEIR INVESTOR RELATIONSHIP, WHEN IT
5 COMES TO DEFENDANTS' SCHEME TO DEFRAUD INVESTORS, DEFENDANTS
6 HAD THE SAME INTENT AS TO WALGREENS AND SAFEWAY AS THEY DID TO
7 THE INDIVIDUALS AND ENTITIES WHO WERE ONLY INVESTORS.

8 THEY HAD AN INTENT TO DECEIVE THOSE ENTITIES AND TO INDUCE
9 THEM INTO INVESTING INTO THE COMPANY, TO GIVING THERANOS MONEY
10 IN EXCHANGE FOR THOSE SECURITIES. AND BECAUSE IT'S ALL PART OF
11 THE SAME SCHEME TO DEFRAUD, THIS DOESN'T REPRESENT AN EXPANSION
12 OF THE INDICTMENT. THE DEFENDANTS HAD BEEN ON NOTICE, AND
13 THEY'RE NOT LEFT TO GUESS AS TO WHAT CHARGES THEY'LL BE FACING
14 AT TRIAL.

15 THE COURT: ALL RIGHT. THANK YOU.

16 MR. LEMENS, THAT BRINGS YOU GREAT COMFORT?

17 MR. LEMENS: I THINK THE QUESTIONS WE WALKED IN
18 WITH, YOUR HONOR, WE STILL HAVE. AS MUCH AS I APPRECIATE
19 MR. BOSTIC'S COMMENTS, HE HASN'T -- AND THE GOVERNMENT HAS NOT
20 CLARIFIED WHAT YOU AND I WERE DISCUSSING ABOUT THE BOARD
21 MEMBERS I THINK IS THE ISSUE HERE. AND I DON'T -- I DIDN'T
22 HEAR AN EXPLANATION AS TO THE STATEMENTS IN THE DUTY TO
23 DISCLOSE DESPITE A RECOGNITION THAT THESE WERE DIFFERENT
24 RELATIONSHIPS WITH THE BUSINESS PARTNERS, WITH THE BOARD
25 MEMBERS AND WITH THE OUTSIDE INVESTORS.

11:46AM 1 SO I DARE SAY THE ISSUES REMAIN, BUT I DON'T HAVE ANYTHING
11:46AM 2 ELSE TO ADD OTHER THAN WE ARE SEEKING THIS INFORMATION ASSUMING
11:46AM 3 THE COURT IS NOT GOING TO DISMISS THE INDICTMENT IN A BILL OF
11:46AM 4 PARTICULARS. SO WE'RE READY FOR TRIAL.

11:46AM 5 THE COURT: OKAY.

11:46AM 6 MR. BOSTIC: YOUR HONOR, I'M HAPPY TO ADDRESS THOSE
11:46AM 7 POINTS FURTHER IF THE COURT WOULD LIKE.

11:46AM 8 THE COURT: YES, I WAS GOING TO TURN TO YOU,
11:46AM 9 MR. BOSTIC, ABOUT THE DUTY. WHY DON'T YOU SPEAK ABOUT THE
11:46AM 10 DUTY. THE COURT SPOKE ABOUT THAT IN ITS ORDERS IN THE MOTION,
11:46AM 11 AND I THINK THE DEFENSE COMMENTED ON THAT ALSO.

11:47AM 12 SO WHAT ABOUT THAT DUTY, THE DUTY TO DISCLOSE?

11:47AM 13 MR. BOSTIC: YES, YOUR HONOR.

11:47AM 14 THE COURT IS ABSOLUTELY CORRECT THAT THIS WAS PREVIOUSLY
11:47AM 15 DISCUSSED. THE DEFENSE ARGUED IN THE PAST THAT THE INDICTMENTS
11:47AM 16 DID NOT SUFFICIENTLY ALLEGE A DUTY TO DISCLOSE.

11:47AM 17 THE COURT REJECTED THAT ARGUMENT. THE COURT EXAMINED THE
11:47AM 18 INDICTMENT, WHICH IN THAT RESPECT IS THE SAME AS THE CURRENT
11:47AM 19 OPERATIVE INDICTMENT. AND THE COURT FOUND THAT THE INDICTMENT
11:47AM 20 SUFFICIENTLY ALLEGED BOTH A DUTY OF TRUST AND ALSO A
11:47AM 21 HALF-TRUTH THEORY ARISING OR LEADING TO A DUTY TO DISCLOSE.

11:47AM 22 AND SPECIFICALLY THE COURT POINTED TO ALLEGATIONS IN THE
11:47AM 23 INDICTMENT THAT SHOWED THAT DEFENDANTS MADE MISREPRESENTATIONS
11:47AM 24 THAT ONLY PROVIDED PART OF THE INFORMATION AND WITHHELD THE
11:47AM 25 REST.

1 THE INDICTMENT ALSO MENTIONS DECEPTIVE TECHNOLOGY DEMOS
2 THAT CAUSED INDIVIDUALS TO BELIEVE THAT THE TECHNOLOGY WORKED
3 RELAXING THEIR NORMAL LEVEL OF DILIGENCE AND SKEPTICISM.

4 THE COURT ALSO MENTIONED THAT THE INDICTMENT INCLUDES
5 ALLEGATIONS THAT THE DEFENDANTS MISREPRESENTED THEIR
6 RELATIONSHIPS WITH OTHER ENTITIES LIKE THE FDA IN AN EFFORT TO
7 FURTHER PERSUADE AND INDUCE INVESTOR VICTIMS TO RELAX AND
8 BELIEVE THAT THERANOS HAD BEEN PREVALIDATED OR THAT IT WAS BONA
9 FIDE.

10 THOSE SAME ALLEGATIONS THAT THE COURT FOUND SUFFICIENT IN
11 THE LAST ROUND OF BRIEFING APPLY EQUALLY TO THE ENTIRE SET OF
12 INVESTORS ALLEGED IN THIS CASE.

13 SO WHEN IT COMES TO WALGREENS AND SAFEWAY, AND AGAIN, THIS
14 IS AN EVIDENCE ISSUE, AND THIS IS NOT THE STAGE TO BE
15 PREJUDGING THE TRIAL EVIDENCE. BUT JUST TO CLARIFY, THERE'S NO
16 REASON TO READ THE INDICTMENT AS ALLEGING A DIFFERENT THEORY OF
17 DUTY TO DISCLOSE AS TO WALGREENS OR SAFEWAY AS IT DOES TO THOSE
18 PREVIOUS INVESTORS. IT DOESN'T DO THAT. THE THEORY IS THE
19 SAME. IT'S THE SAME THEORY THAT THE COURT FOUND PREVIOUSLY
20 SUFFICIENT.

21 I ALSO JUST HAD SOME POINTS TO MAKE ABOUT THE REQUEST FOR
22 A BILL OF PARTICULARS, BUT I DON'T WANT TO MOVE ON TO THAT
23 UNLESS THE COURT --

24 THE COURT: NO. WHY DON'T YOU -- THAT WAS MY SECOND
25 QUESTION.

11:49AM 1 BUT BEFORE WE DO THAT, I MENTIONED EARLIER TO MR. LEMENS,
11:49AM 2 IT SEEMS LIKE THIS DUTY TO DISCLOSE, THE ALLEGED DUTY TO
11:49AM 3 DISCLOSE, IT SEEMS LIKE IT'S MORE APPROPRIATE FOR THE TRIAL.
11:49AM 4 AND, YOU KNOW, THE SHIELDS CASE, 844 FED. 3D AND THE MILANOVICH
11:49AM 5 TRIAL AT 678 FED. 3D TELL US THAT THAT'S THE APPROPRIATE AREA
11:49AM 6 TO PROCEED IF NOT AN INSTRUCTION BUT A RULE 29 TYPE MOTION.

11:49AM 7 BUT LET ME ASK YOU TO -- WHY SHOULDN'T -- WOULDN'T A BILL
11:49AM 8 OF PARTICULARS JUST CLEAR THIS UP? AND WHY WOULDN'T YOU AGREE
11:49AM 9 THAT A NOMINAL BILL OF PARTICULARS THAT MEMORIALIZES WHAT WE'VE
11:50AM 10 TALKED ABOUT HERE AS WE IDENTIFY THE CLASS OF INDIVIDUALS, THAT
11:50AM 11 IS, THE CLASS OF INVESTORS WHO PURCHASED SECURITIES FOR CASH
11:50AM 12 MONEY, INVESTORS WHO RECEIVE -- EXCUSE ME, BUSINESS PARTNERS
11:50AM 13 WHO MADE INVESTMENTS OF A DIFFERENT TYPE OF A SECURITY, AND
11:50AM 14 THEN SEGREGATING AND PARSING OUT THOSE WHO -- BOARD MEMBERS WHO
11:50AM 15 RECEIVED THEIR COMPENSATION IN THE FORM OF SECURITIES, THAT CAN
11:50AM 16 BE DONE IN ONE PAGE OF A BILL OF PARTICULARS I WOULD THINK.

11:50AM 17 WHY SHOULDN'T WE DO THAT?

11:50AM 18 MR. BOSTIC: ONLY BECAUSE IT'S NOT NECESSARY,
11:50AM 19 YOUR HONOR.

11:50AM 20 WHEN THE COURT PREVIOUSLY CONSIDERED WHETHER TO REQUIRE A
11:50AM 21 BILL OF PARTICULARS ON THE INVESTOR SIDE OF THE ALLEGATIONS IN
11:50AM 22 THIS CASE, THE COURT FOUND THAT THE ORIGINAL INDICTMENTS STATED
11:50AM 23 THE ACTS UNDERLYING THE INVESTOR SCHEME, AND THAT WAS
11:50AM 24 SUFFICIENT TO ACCOMPLISH THE GOALS OF THE CHARGING DOCUMENT AND
11:51AM 25 THAT A BILL OF PARTICULARS WASN'T NECESSARY.

1 THE SAME IS TRUE HERE. THERE'S NO REQUIREMENT THAT AN
2 INDICTMENT IDENTIFY EVERY SINGLE INDIVIDUAL WHO ENDED UP BEING
3 A VICTIM OF A SCHEME TO DEFRAUD.

4 INSTEAD, THE REQUIREMENT FOR THE INDICTMENT IS THAT IT
5 IDENTIFY THE SCHEME ITSELF WITH ENOUGH PARTICULARITY THAT THE
6 DEFENDANT KNOWS AND CAN PREPARE FOR TRIAL AND ALSO, OF COURSE,
7 DEFEND AGAINST POTENTIAL DUPLICATIVE PROSECUTION DOWN THE ROAD.

8 THE THIRD SUPERSEDING INDICTMENT ACHIEVES THOSE GOALS THE
9 SAME WAY THAT THE PREVIOUS VERSIONS OF THE INDICTMENT DID.

10 IT DESCRIBES THE SPECIFIC MISREPRESENTATIONS THAT THE
11 DEFENDANTS MADE OR RATHER THE SUBSTANCE OF THOSE
12 MISREPRESENTATIONS. IT SAYS THAT THEY WERE MADE TO INVESTORS.

13 THE TERM "INVESTORS" HAS ITS COMMON MEANING, THE SAME
14 MEANING THAT IT HAD BACK WHEN THOSE PREVIOUS INDICTMENTS WERE
15 RETURNED BY THE GRAND JURY.

16 AND SO AS THE COURT PREVIOUSLY RECOGNIZED, GIVEN THAT AN
17 INDICTMENT IS TO BE READ WITH COMMON SENSE AND THAT SPECIFIC
18 ALLEGATIONS ARE NOT THE STANDARD, THAT INSTEAD IT'S ONLY
19 NECESSARY THAT THE PARTICULARS OF THE SCHEME MUST BE DESCRIBED,
20 THE CURRENT INDICTMENT MEETS THAT STANDARD.

21 THE COURT PREVIOUSLY FOUND THAT THE INVESTOR FRAUD
22 ALLEGATIONS DESCRIBE THE SPECIFIC TYPE OF MISREPRESENTATIONS AT
23 ISSUE AND THAT THAT WAS SUFFICIENT.

24 HERE, WHEN WE'RE TALKING ABOUT THE IDENTITIES OF THE
25 VICTIMS, THAT WILL BE IMPORTANT WHEN IT COMES TIME TO DISCUSS

11:52AM 1 RESTITUTION, FOR EXAMPLE. BUT AT THIS STAGE, AGAIN, THE FOCUS
11:52AM 2 SHOULD PROPERLY BE ON THE NATURE OF THE SCHEME ITSELF. THERE
11:52AM 3 ARE INDIVIDUALS WHO ENDED UP BEING VICTIMS. THERE'S A LARGER
11:52AM 4 SET OF INDIVIDUALS WHO WERE TARGETED, OF COURSE. A SCHEME TO
11:52AM 5 DEFRAUD INVESTORS INCLUDES EFFORTS BY THE DEFENDANTS TO MAKE
11:52AM 6 OTHER INDIVIDUAL INVESTORS.

11:52AM 7 SO THIS IS NOTHING THAT IS UNIQUE TO THIS CASE. AND
11:53AM 8 BECAUSE THE DEFENSE HAS THE INFORMATION IT NEEDS TO IDENTIFY
11:53AM 9 THOSE INVESTORS, AGAIN, UNDER THE STANDARD DEFINITION A BILL OF
11:53AM 10 PARTICULARS ISN'T NECESSARY.

11:53AM 11 I'LL ALSO NOTE THAT RECENTLY THE GOVERNMENT PROVIDED A
11:53AM 12 SUPPLEMENT TO ITS 404(B) NOTICE. THAT WAS A VERY LENGTHY AND
11:53AM 13 THOROUGH DISCLOSURE TO THE DEFENDANTS, AND IT CONTAINED VERY
11:53AM 14 SUBSTANTIAL SECTIONS DETAILING FALSE STATEMENTS MADE TO BOTH
11:53AM 15 SAFEWAY AND WALGREENS. SO THAT INFORMATION IS, AGAIN,
11:53AM 16 AVAILABLE TO THE DEFENSE.

11:53AM 17 THE COURT: ALL RIGHT. THANK YOU.

11:53AM 18 MR. LEMENS, ANYTHING IN CLOSING BEFORE WE -- I KNOW WE
11:53AM 19 HAVE TALKED ABOUT THIS 496. I KNOW THAT WE HAVE CROSSED OVER A
11:53AM 20 LITTLE BIT AS TO 497.

11:53AM 21 BUT ANYTHING FURTHER BEFORE I GIVE YOU AN OPPORTUNITY TO
11:53AM 22 SPEAK, ANYTHING FURTHER ON THE DUPLICITOUS MOTION?

11:53AM 23 MR. LEMENS: SURE, YOUR HONOR. I THINK I WILL TRY
11:53AM 24 TO FIND SOME AREA OF AGREEMENT WITH MR. BOSTIC THAT THE NATURE
11:53AM 25 OF THE SCHEME IS IMPORTANT. WE THINK THAT THAT HASN'T

11:54AM 1 SUFFICIENTLY BEEN ALLEGED OR EXPLAINED EITHER UNDER THE
11:54AM 2 INDICTMENT OR SUBSEQUENT CORRESPONDENCE.

11:54AM 3 AND WE'RE STILL IN THE SAME PLACE WITH RESPECT TO THE
11:54AM 4 BOARD MEMBERS. THERE'S NO DISCUSSION OF THE SPECIFIC ISSUES
11:54AM 5 THAT WE HAVE RAISED IN THE INDICTMENT ITSELF. THERE'S NO
11:54AM 6 EXEMPLARY -- THERE ARE NO BOARD WIRES THAT ARE ALLEGED OR
11:54AM 7 IDENTIFIED, THERE'S NO DISCUSSION OF THE EXTENT OF THE SCHEME
11:54AM 8 WITH RESPECT TO THE BOARD MEMBERS.

11:54AM 9 SO I DO THINK A BILL OF PARTICULARS AT THE VERY LEAST IS
11:54AM 10 NECESSARY TO CLARIFY THE ISSUES, BUT I THINK WE HAVE MORE THAN
11:54AM 11 COVERED EVERYTHING ELSE, AND I APPRECIATE YOUR HONOR'S TIME AND
11:54AM 12 ATTENTION.

11:54AM 13 THE COURT: OKAY. THANK YOU.

11:54AM 14 IS THERE ANYTHING YOU WANT TO ADD TO THE 497 DISCUSSION?

11:54AM 15 MR. LEMENS: JUST VERY QUICKLY.

11:54AM 16 I THINK YOUR HONOR, IN THE COURSE OF OUR LAST
11:54AM 17 CONVERSATION, LAID OUT THE DIFFERENCES BETWEEN THESE THREE
11:54AM 18 GROUPS, THE OUTSIDE INVESTORS, THE BOARD MEMBERS, AND THE
11:54AM 19 BUSINESS PARTNERS THAT ARE ALL SWEEPED INTO THIS SAME SCHEME.
11:55AM 20 IT'S THOSE DIFFERENCES THAT, IN OUR VIEW, MAKE THE COUNT
11:55AM 21 DUPLICITOUS, MAKE THE SCHEME DUPLICITOUS.

11:55AM 22 YOU HAVE VERY DIFFERENT RELATIONSHIPS, VERY DIFFERENT
11:55AM 23 TRANSACTIONS, TYPES OF TRANSACTIONS, DIFFERENT TIMEFRAME AT
11:55AM 24 ISSUE, AND IT'S -- YOU KNOW, WHEN YOU LOOK AT THE FACTORS UNDER
11:55AM 25 GORDON THAT WE'RE INSTRUCTED TO CONSIDER, WE THINK THE

1 GOVERNMENT IS TRYING TO BLEND THREE SCHEMES INTO ONE, WHETHER
2 THAT'S TO AVOID EVIDENTIARY OR STATUTE OF LIMITATIONS ISSUES,
3 AND THAT MAKES THE INDICTMENT DUPLICITOUS.

4 THE COURT: OKAY.

5 MR. BOSTIC, ARE YOU SPEAKING TO THAT?

6 MR. LEACH, I THINK YOU ARE.

7 MR. LEACH: YES, YOUR HONOR. I HAVE RESPONSIBILITY
8 FOR THE DUPLICITY MOTION. JUST VERY, VERY BRIEFLY.

9 OF COURSE, CLEVER LAWYERS, IF THEY HAVE FIVE DIFFERENT
10 INVESTORS IN ANY SCHEME OR FIVE DIFFERENT POTENTIAL INVESTORS
11 IN ANY SCHEME, COULD FIND DIFFERENCES BETWEEN HOW THOSE
12 PARTICULAR INDIVIDUALS ARE SITUATED. BUT THAT'S NOT THE
13 STANDARD.

14 THE NINTH CIRCUIT STANDARD IS VERY CLEAR AND IT'S SET
15 FORTH IN MORSE, AND THE BRYAN CASE, AND THE MASTELOTTO CASE.
16 AND THE NINTH CIRCUIT IS VERY CLEAR THAT IF THE INDICTMENT
17 FAIRLY READ ALLEGES A SINGLE SCHEME IT IS SUFFICIENT. AND YOU
18 CAN HAVE DISTINCT MEANS AND METHODS WITH RESPECT TO DIFFERENT
19 INVESTORS. YOU CAN HAVE DISTINCT REPRESENTATIONS TO DIFFERENT
20 INVESTORS. YOU CAN HAVE DIFFERENT PEOPLE. YOU CAN HAVE IT
21 OVER AN EXTENDED PERIOD OF TIME.

22 AND ACCORDING TO THE BRYAN CASE, WHICH I THINK IS THE MOST
23 INSTRUCTIVE AND THE MOST ON POINT, YOU CAN HAVE DISTINCT
24 CLASSES OF VICTIMS.

25 AND SO OF COURSE THERE ARE DIFFERENCES BETWEEN SAFEWAY AND

11:56AM 1 WALGREENS AND OTHER INVESTORS, THERE ARE DIFFERENCES WITHIN THE
11:56AM 2 CLASS OF INDIVIDUAL INVESTORS, BUT THAT'S JUST NOT THE
11:57AM 3 STANDARD. AND THERE'S NO CASE TO SUPPORT THIS NOTION THAT THE
11:57AM 4 COURT HAS TO, YOU KNOW, WEIGH ALL OF THE NUANCED DISTINCTIONS
11:57AM 5 BETWEEN DIFFERENT PEOPLE OR DIFFERENT ENTITIES. IT'S WHAT WAS
11:57AM 6 IN THE HEAD OF THE FRAUDSTER. IT'S HOW THE SCHEME IS ALLEGED.

11:57AM 7 AND HERE THE INDICTMENT FAIRLY READ ALLEGES A SINGLE
11:57AM 8 SCHEME TO DEFRAUD. IT'S TO OBTAIN MONEY OR PROPERTY FROM
11:57AM 9 INVESTORS. THE COURT HAS ASKED NUMEROUS TIMES DID SAFEWAY AND
11:57AM 10 WALGREENS MAKE AN INVESTMENT? AND MR. LEMENS DOESN'T WANT TO
11:57AM 11 ANSWER THAT QUESTION.

11:57AM 12 IT'S ABSOLUTELY YES. THERANOS -- OR SAFEWAY AND WALGREENS
11:57AM 13 TRANSFERRED MONEY TO THERANOS IN EXCHANGE FOR SECURITIES. SO
11:57AM 14 DID CERTAIN BOARD MEMBERS. IT'S -- I THINK THE -- YOU KNOW,
11:57AM 15 THIS IS REALLY MAKING SOMETHING THAT IS QUITE SIMPLE
11:57AM 16 UNNECESSARILY COMPLICATED.

11:57AM 17 SO FOR THOSE REASONS WE DON'T SEE A DUPLICITY ISSUE HERE,
11:58AM 18 AND THE COURT SHOULD DENY THE 497.

11:58AM 19 THE COURT: THANK YOU, MR. LEACH.

11:58AM 20 AND UNLESS THERE'S ANYTHING FURTHER, MR. LEMENS, I'D LIKE
11:58AM 21 TO MOVE ON TO 499.

11:58AM 22 MR. COOPERSMITH: YOUR HONOR, THIS IS -- IF I COULD
11:58AM 23 JUST ADD ONE QUICK THING ABOUT THE MOTION THAT WE JUST HEARD?

11:58AM 24 THE COURT: THIS IS MR. COOPERSMITH SPEAKING?

11:58AM 25 MR. COOPERSMITH: YES, YOUR HONOR. THANK YOU.

11:58AM 1 THE COURT: GO AHEAD, MR. COOPERSMITH.

11:58AM 2 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

11:58AM 3 SO JUST TO ILLUSTRATE THE DIFFERENCES, BUT IT REALLY GOES
11:58AM 4 TO THIS POINT ABOUT DUTY TO DISCLOSE AS WELL AND THAT IS THAT
11:58AM 5 WE UNDERSTAND, OF COURSE, IN THE COURT'S PRIOR RULING YOUR
11:58AM 6 HONOR FOUND THAT THERE WAS A DUTY SUFFICIENTLY AKIN TO A
11:58AM 7 FIDUCIARY DUTY TO ALLOW OMISSIONS TO BE -- TO GO FORWARD.

11:58AM 8 AND THAT WAS WHEN WE WERE TALKING ABOUT INVESTORS THAT ARE
11:58AM 9 COMMONLY UNDERSTOOD AS PEOPLE OUTSIDE OF THERANOS WHO PUT IN
11:58AM 10 MONEY IN EXCHANGE FOR SECURITIES.

11:58AM 11 NOW WE'RE TALKING ABOUT VERY DIFFERENT TYPES OF INVESTORS,
11:59AM 12 WALGREENS, SAFEWAY, AND THEN THE BOARD MEMBERS. OBVIOUSLY WE
11:59AM 13 RESPECTFULLY DISAGREE WITH THE COURT'S PRIOR RULING.

11:59AM 14 BUT MOVING ON TO THESE OTHER INVESTORS, WE'RE TALKING
11:59AM 15 ABOUT PEOPLE IN THE CASE OF SAFEWAY, WALGREENS WHO HAD HEAVY
11:59AM 16 DUE DILIGENCE RIGHTS, WHO HAD VERY DIFFERENT RELATIONSHIPS WITH
11:59AM 17 THERANOS. AND THE BOARD MEMBERS, IT'S VERY HARD FOR ME TO
11:59AM 18 UNDERSTAND HOW THERANOS WOULD HAVE ANY SORT OF DUTY AKIN TO A
11:59AM 19 FIDUCIARY DUTY WITH RESPECT TO THESE OTHER CLASSES OF
11:59AM 20 INVESTORS, AND I THINK THAT'S A DIFFERENCE THAT GOES TO A
11:59AM 21 DUPLICITY MOTION AS WELL AS TO THE DUTY TO DISCLOSE ISSUE.

11:59AM 22 AND, YOUR HONOR, THE OTHER THING I'LL SAY, JUST TO CLOSE,
11:59AM 23 IS THAT IF WE'RE, IF WE'RE -- IF THE COURT IS INCLINED TO ALLOW
11:59AM 24 THAT TO BE A TRIAL ISSUE OR A RULE 29 ISSUE AT TRIAL, THEN I
11:59AM 25 THINK THAT WOULD GO FOR ALL OF THE DIFFERENT CLASSES OF

11:59AM 1 INVESTORS, INCLUDING THE ORIGINAL CLASS OF INVESTORS AND NOT
11:59AM 2 JUST THE NEW CLASS OF INVESTORS. MAYBE THAT GOES WITHOUT
11:59AM 3 SAYING, BUT I DO THINK THAT THERE'S A DIFFERENCE, AND I JUST
11:59AM 4 WANTED TO POINT THAT OUT.

12:00PM 5 THE COURT: THANK YOU.

12:00PM 6 MR. COOPERSMITH, YOU SUGGEST THAT THERE'S GREATER DETAILS
12:00PM 7 WITH THE INSTITUTIONAL, THE CORPORATE INVESTORS SHALL WE SAY,
12:00PM 8 AND WOULD THE -- NECESSARILY THE AGREEMENTS THAT MADE THOSE
12:00PM 9 PURCHASES AVAILABLE, THAT IS, THE PURCHASE AGREEMENTS OF
12:00PM 10 SAFEWAY AND WALGREENS, WOULD THOSE -- REVIEW OF THOSE DOCUMENTS
12:00PM 11 BETTER INFORM AS TO SOME OF THE THINGS THAT YOU'VE RAISED?

12:00PM 12 MR. COOPERSMITH: I THINK SO, YOUR HONOR. YES.

12:00PM 13 THE COURT: OKAY. ALL RIGHT. THANKS VERY MUCH.

12:00PM 14 LET'S MOVE TO 499 THEN. THIS IS THE CONVERGENCE MOTION.
12:00PM 15 I'LL CALL IT THAT.

12:00PM 16 THIS IS MR. BALWANI'S JOINDER AT 504; 520 IS THE
12:00PM 17 GOVERNMENT'S OPPOSITION; AND 544 IS MS. HOLMES'S REPLY.

12:00PM 18 AND WHO IS SPEAKING ON THIS, ON BEHALF OF --

12:00PM 19 MS. TREFZ: I AM, YOUR HONOR. KATIE TREFZ.

12:01PM 20 THE COURT: MS. TREFZ, WHAT WOULD YOU LIKE ME TO
12:01PM 21 KNOW THAT IS NOT CAPTURED IN YOUR PLEADINGS?

12:01PM 22 MS. TREFZ: I THINK WHAT WE HAVE HERE, YOUR HONOR,
12:01PM 23 IS A SITUATION WHERE IN RESPONSE TO THE COURT'S PRIOR RULING
12:01PM 24 THE NEW INDICTMENTS MAKE A FEW DELETIONS, BUT THEY ULTIMATELY
12:01PM 25 KEPT THE MAJORITY OF THE ALLEGATIONS WITH RESPECT TO THE ROLE

1 OF DOCTORS AND PATIENTS THE SAME.

2 THERE ARE NO NEW ALLEGATIONS FLESHING OUT THAT
3 RELATIONSHIP, AND SO IN -- TO OUR VIEW IT'S NO SURPRISE THAT
4 WHEN YOU READ THE INDICTMENT AS A WHOLE, AND AGAIN STICKING TO
5 ITS FOUR CORNERS, IT STILL CASTS THE DOCTORS AND THE PATIENTS
6 AS INDEPENDENT VICTIMS.

7 OUR VIEW IS THAT THIS VIOLATES THE COURT'S ORDER AND THE
8 REQUIREMENTS OF LEW, AND, YOU KNOW, THE -- JUST AS RECENTLY AS
9 A FEW MONTHS AGO IN MILLER THE NINTH CIRCUIT, YOU KNOW,
10 REAFFIRMED THE IDEA THAT THERE'S NO INTENT TO -- THAT INTENT TO
11 DECEIVE WITHOUT AN INTENT TO DEFRAUD IS NOT WIRE FRAUD.

12 I GUESS THE -- FOR US THE KEY ISSUE HERE IS THAT THE
13 INDICTMENT DOESN'T ALLEGE THAT ANY ALLEGED MISREPRESENTATIONS
14 TO DOCTORS WERE ACTUALLY AIMED AT PATIENTS. SO ON THE FACE OF
15 THE INDICTMENT THE ALLEGATIONS THAT WERE -- THAT THE DEFENDANTS
16 DECEIVED DOCTORS CONTINUES TO RUN AFOUL OF THE RULE.

17 THE COURT: SO LET ME ASK YOU A QUESTION. I WANT TO
18 FOCUS ON WHAT I THINK IS AN ISSUE HERE. BUT FIRST FOR THE
19 BENEFIT OF THE COURT REPORTER, THE LEW YOU WERE SPEAKING TO,
20 THAT WAS L-I-U? THE L-I-U CASE?

21 MS. TREFZ: I'M TALKING ABOUT LEW, L-E-W.

22 THE COURT: L-E-W. THANK YOU.

23 SO WHEN I LOOK AT THIS ARGUMENT I'D LIKE TO FOCUS, IF YOU
24 COULD, PLEASE, HELP ME OUT ON PARAGRAPHS 22 AND 14, PLEASE.
25 THAT SEEMS TO BE -- OF THE INDICTMENT. AT LEAST MY ATTENTION

12:03PM 1 IS DRAWN TO THAT.

12:03PM 2 IT MIGHT BE THAT THE WORDING OF THAT IS SOMETHING THAT
12:03PM 3 MIGHT BE PROBLEMATIC. I THINK PARAGRAPH 22 READS, "USE OF
12:03PM 4 FALSE PRETENSES TO INDUCE DOCTORS TO REFER AND PATIENTS TO
12:03PM 5 PAY."

12:03PM 6 AND I THINK YOUR PLEADING SUGGESTS THAT THIS SUGGESTS THAT
12:03PM 7 THAT LANGUAGE SUGGESTS THAT BOTH DOCTORS AND PATIENTS ARE
12:03PM 8 VICTIMS.

12:03PM 9 IS THAT YOUR POSITION?

12:03PM 10 MS. TREFZ: THAT IS OUR POSITION, YOUR HONOR. I
12:03PM 11 THINK WITH RESPECT TO BOTH PARAGRAPH 14 AND PARAGRAPH 22 THOSE
12:03PM 12 PARAGRAPHS ESSENTIALLY REMAINED EXACTLY THE SAME IN RELEVANT
12:03PM 13 PART AS IN THE SUPERSEDING INDICTMENT.

12:03PM 14 AND YOU DO HAVE TO LOOK AT THE INDICTMENT AS A WHOLE, BUT
12:04PM 15 WHEN YOU LOOK AT THOSE TWO PARAGRAPHS IN PARTICULAR, YOU SEE
12:04PM 16 THEM BASICALLY PLED AS INDEPENDENT VICTIMS OF -- WITH
12:04PM 17 INDEPENDENT ROLES IS OUR VIEW.

12:04PM 18 THE COURT: SO THE GOVERNMENT WILL ANSWER THIS
12:04PM 19 QUESTION, AMONGST OTHERS, BUT I WAS JUST CURIOUS WHETHER OR NOT
12:04PM 20 THAT PHRASING THEN, DOES THAT PUT ADDITIONAL BURDEN ON THE
12:04PM 21 GOVERNMENT AS FAR AS ELEMENTS OF PROOF? DO THEY NOW HAVE TO
12:04PM 22 PROVE ACTION OR CONDUCT OF THE DOCTORS IN PROVIDING THIS
12:04PM 23 INFORMATION TO PATIENTS? DO THEY NOW HAVE TO, IF THIS LANGUAGE
12:04PM 24 STAYS, ARE THEY THEN GOING TO HAVE TO PROVE THAT THE DOCTORS
12:04PM 25 WERE DECEIVED BY SPECIFIC DEFENDANTS? IS THAT YOUR VIEW OF

12:04PM 1 WHAT THIS IS?

12:04PM 2 MS. TREFZ: WELL, WE DO -- UNDER THE CURRENT FRAMING
12:04PM 3 OF THE INDICTMENT, I DO THINK THAT THE GOVERNMENT WILL NEED TO
12:04PM 4 PROVE THAT DOCTORS WERE INDEPENDENTLY DECEIVED.

12:05PM 5 BUT IN OUR VIEW I GUESS THE MORE IMPORTANT POINT IS THAT
12:05PM 6 UNDER THE COURT'S PRIOR RULING AND UNDER LEW IT'S NOT AN
12:05PM 7 APPROPRIATE BASIS OF WIRE FRAUD TO ALLEGE A DECEPTION OF
12:05PM 8 DOCTORS WITHOUT ALSO AN ALLEGED INTENT TO DEPRIVE THEM OF MONEY
12:05PM 9 OR PROPERTY.

12:05PM 10 THE COURT: I'M SORRY. I'M SORRY.

12:05PM 11 MS. TREFZ: NO, NOT AT ALL.

12:05PM 12 THE COURT: IT SEEMS LIKE THE DOCTORS HERE WERE LIKE
12:05PM 13 A CONDUIT, THEY WERE LIKE A BILLBOARD ADVERTISING, AREN'T THEY?
12:05PM 14 USE THIS DEVICE AND REFER PATIENTS TO THAT WHERE THEY DIDN'T
12:05PM 15 RECEIVE ANY -- AT LEAST I DON'T THINK I'VE SEEN ANYTHING THAT
12:05PM 16 SUGGESTS THAT THEY RECEIVED ANY COMPENSATION FOR THOSE
12:05PM 17 REFERRALS.

12:05PM 18 I SUPPOSE IF I TAKE YOUR POINT THAT THE INDICTMENT COULD
12:05PM 19 DESCRIBE THE DOCTOR'S CONDUCT A LITTLE BETTER.

12:05PM 20 MAYBE IT WOULD READ THAT THE USE OF FALSE PRETENSES SUCH
12:06PM 21 THAT DOCTORS REFERRED PATIENTS TO THERANOS, OR THAT PATIENTS
12:06PM 22 WHO ULTIMATELY USED THERANOS BASED ON FALSE PRETENSES FROM
12:06PM 23 ADVERTISEMENTS OR OTHER REFERRALS WHO THEREFORE PAID FOR THEIR
12:06PM 24 TESTING. AND, OF COURSE, WE CAN WORDSMITH IT TO FIND SOMETHING
12:06PM 25 BETTER -- OR DIFFERENT I SHOULD SAY, NOT NECESSARILY BETTER.

1 IS THERE AN AGENCY SITUATION HERE? IS THERE AN AGENCY
2 HERE THAT WE SHOULD BE LOOKING AT?

3 MS. TREFZ: I CERTAINLY DON'T THINK THAT THERE'S AN
4 AGENCY THAT IS ALLEGED IN THE INDICTMENT.

5 WITH RESPECT TO THE CONDUIT THEORY THAT THE COURT
6 MENTIONS, THAT'S THE THEORY THAT THE GOVERNMENT FLOATED DURING
7 THE PRIOR ROUND, AND IT CITED TO CICCONE. AND THE COURT
8 PREVIOUSLY ADDRESSED HOW CICCONE IS NOT APPLICABLE HERE.

9 FOR THE COURT REPORTER'S BENEFIT CICCONE IS SPELLED
10 C-I-C-C-O-N-E.

11 YOU KNOW, I THINK THAT THE COURT'S PRIOR RULING PROPERLY
12 APPLIED CICCONE TO THIS CASE AND SAID IT WAS INAPPLICABLE.

13 WITH RESPECT TO -- AGAIN, WITH RESPECT TO THIS CONDUIT
14 THEORY, THE GOVERNMENT INCLUDES NO -- THE INDICTMENT INCLUDES
15 NO ALLEGATION, JUST AS IT DIDN'T PREVIOUSLY, THAT THE DOCTORS
16 WERE DIRECTED TO PASS ON ANY STATEMENTS, OR THAT DEFENDANTS
17 INTENDED FOR THE MISREPRESENTATIONS TO PASS DIRECTLY ON OR THAT
18 THE MISREPRESENTATIONS TO DOCTORS WERE ACTUALLY AIMED AT
19 PATIENTS. THAT'S NOT IN THE INDICTMENT. THAT'S IN THE
20 GOVERNMENT'S ARGUMENTS.

21 THE GOVERNMENT DOES MAKE AN ARGUMENT THAT THIS IS FAIRLY
22 INFERRED FROM THE INDICTMENT, BUT WE TAKE ISSUE WITH THAT.
23 SHOULD IT REALLY BE INFERRED THAT THE DEFENDANTS INTENDED FOR
24 LICENSED INDEPENDENT MEDICAL PROFESSIONALS TO LITERALLY JUST
25 PARROT WHAT THEY SAW ON TELEVISION TO THE PATIENTS? AND THAT

12:08PM 1 DOESN'T SEEM LOGICAL TO US AS A PRACTICAL MATTER.

12:08PM 2 SO WITHOUT AN ALLEGATION INDICATING THAT THAT THEORY HAS
12:08PM 3 BEEN BLESSED BY THE GRAND JURY, WE DON'T THINK THAT'S
12:08PM 4 REASONABLE.

12:08PM 5 IF THAT'S THE THEORY, WE THINK IT SHOULD BE IN THE
12:08PM 6 INDICTMENT.

12:08PM 7 ADDITIONALLY, JUST TO GO BACK TO LEW, IT'S STILL THE CASE
12:08PM 8 THAT LEW DOES NOT BLESS A THEORY OF WIRE FRAUD THAT CASTS
12:08PM 9 DOCTORS AS, YOU KNOW, IN THIS SEPARATE REFERRAL ROLE FOR
12:08PM 10 PATIENTS.

12:08PM 11 LEW REQUIRES THAT THE INTENDED RECIPIENT OF THE DECEIT IS
12:08PM 12 THE SAME AS THE INTENDED PERSON WHO WAS INTENDED TO BE DEPRIVED
12:08PM 13 OF PROPERTY.

12:08PM 14 THERE'S NO CONVERGENCE IN THOSE TWO THINGS, AND WE WOULD
12:08PM 15 JUST CONTINUE TO POINT THE COURT THERE.

12:09PM 16 THE COURT: OKAY. MR. BOSTIC, ARE YOU ARGUING THIS?

12:09PM 17 MR. BOSTIC: I AM. THANK YOU, YOUR HONOR.

12:09PM 18 SO I WANT TO ACKNOWLEDGE THAT THE COURT PREVIOUSLY
12:09PM 19 CONSIDERED THE STATUS OF DOCTORS IN THIS CASE AND CERTAINLY
12:09PM 20 RULED IN NO UNCERTAIN TERMS THAT DOCTORS DO NOT QUALIFY AS
12:09PM 21 VICTIMS OF THE FRAUD.

12:09PM 22 THE GOVERNMENT HEARD WHAT THE COURT SAID ON THAT SUBJECT
12:09PM 23 AND THE CHANGES TO THE SUPERSEDING INDICTMENTS REFLECT THAT
12:09PM 24 UNDERSTANDING.

12:09PM 25 THE DEFENSE CONTINUES TO OBJECT THAT DOCTORS ARE MENTIONED

1 IN THE CHARGING DOCUMENTS, BUT THAT'S SIMPLY BECAUSE DOCTORS
2 WERE AN IMPORTANT PART OF THERANOS'S SCHEME TO DEFRAUD THE
3 PATIENTS.

4 SO THE FACTS ALLEGED IN THE OPERATIVE INDICTMENTS ARE
5 SIMILAR, OR THE OPERATIVE INDICTMENT, EXCUSE ME, IS SIMILAR TO
6 THE FACTS ALLEGED PREVIOUSLY BECAUSE THE SCHEME TO DEFRAUD
7 PATIENTS IS STILL THE SAME SCHEME TO DEFRAUD THE PATIENTS.

8 BUT THE WAY THAT THE OPERATIVE INDICTMENT CHARACTERIZES
9 THOSE FACTS IS VERY DIFFERENT, AND THAT REFLECTS THE COURT'S
10 ORDER, AND THAT DEFEATS THE DEFENDANTS' CURRENT MOTION.

11 THE GOVERNMENT'S BRIEF WALKS THE COURT THROUGH A NUMBER OF
12 INSTANCES WHERE LANGUAGE WAS CHANGED IN THE INDICTMENT TO MAKE
13 CLEAR THAT THE GOVERNMENT IS NO LONGER ALLEGING THAT DOCTORS
14 THEMSELVES WERE INDEPENDENT VICTIMS OF THE SCHEME TO DEFRAUD OR
15 TARGETS OF THE SCHEME TO DEFRAUD.

16 INSTEAD, THEY FUNCTIONED AS UNWITTING PARTICIPANTS IN THE
17 DEFENDANTS' SCHEME TO DEFRAUD PATIENTS.

18 SO WHEN LOOKING AT ALL OF THE LANGUAGE IN THE INDICTMENT
19 THAT REFERENCES THE ROLE THAT DOCTORS PLAYED, IT NEEDS TO BE
20 VIEWED IN THAT CONTEXT CONSISTENT WITH THE LAW'S INSTRUCTION
21 THAT THE INDICTMENTS BE READ AS A WHOLE AND READ WITH COMMON
22 SENSE AND READ TO INCLUDE FACTS THAT ARE NECESSARILY IMPLIED.

23 SO WHEN AN INDICTMENT UNDER A HEADING SCHEME TO DEFRAUD
24 PATIENTS TALKS ABOUT HOW DEFENDANTS DIRECTED SOME
25 MISREPRESENTATIONS TO DOCTORS WHO THEN WERE MISLED AND IN TURN

12:11PM 1 REFERRED PATIENTS TO THERANOS SO THEY COULD GET TESTING AND BE
12:11PM 2 DEFRAUDED, THAT IS THE GOVERNMENT'S THEORY, THE THEORY OF
12:11PM 3 DOCTORS SERVING AS CONDUITS FOR THOSE FALSE REPRESENTATIONS IS
12:11PM 4 IN THE INDICTMENT.

12:11PM 5 THE COURT: SO, SO, MR. BOSTIC, WHAT I HEARD YOU SAY
12:11PM 6 IS THAT IT'S GOING TO BE PART OF YOUR BURDEN, THE GOVERNMENT'S
12:11PM 7 BURDEN TO ACTUALLY PROVE THEN, AN ELEMENT OF THE OFFENSE WOULD
12:11PM 8 BE TO PROVE THAT THE DOCTORS WERE MISLED?

12:11PM 9 MR. BOSTIC: WELL, YOUR HONOR, I THINK THE
12:11PM 10 GOVERNMENT IS REQUIRED TO PROVE THE DEFENDANT'S INTENT TO
12:11PM 11 DEFRAUD PATIENTS. CERTAINLY THAT'S WHAT IS ALLEGED IN THE
12:11PM 12 INDICTMENT.

12:11PM 13 THE EVIDENCE AT TRIAL WILL SHOW THAT PART OF THAT SCHEME
12:11PM 14 TO DEFRAUD INCLUDED DIRECTING EVIDENCE AT DOCTORS SO THAT
12:11PM 15 DOCTORS COULD THEN PASS THAT FALSE INFORMATION ON TO PATIENTS.
12:12PM 16 SO THAT WILL BE PART OF THE PROOF AT TRIAL.

12:12PM 17 THESE CHARGES, THOUGH, DON'T REST ON THAT PROOF BECAUSE,
12:12PM 18 AGAIN, THAT'S ONLY ONE FACET OF THE DEFENDANTS' SCHEME TO
12:12PM 19 DEFRAUD PATIENTS. IT ALSO INCLUDED STATEMENTS THAT THE
12:12PM 20 DEFENDANTS MADE TO JOURNALISTS, IT ALSO INCLUDED STATEMENTS
12:12PM 21 MADE IN MARKETING MATERIALS. THEY USED A VARIETY OF TOOLS.

12:12PM 22 THE COURT: BUT AS TO THESE DOCTORS' SPECIFICS, IF
12:12PM 23 YOU'RE GOING TO SUGGEST TO A JURY THAT CONVICTION OF A CERTAIN
12:12PM 24 COUNT WHERE THE DOCTORS WERE MISLED BY THERANOS, BY THE
12:12PM 25 DEFENDANTS, AND THAT CAUSED THE DOCTORS THEN TO REFER OR IN

12:12PM 1 RELIANCE BY THE DOCTOR ON THAT MISINFORMATION, THEY REFERRED
12:12PM 2 THE PATIENTS, IT SOUNDS LIKE THAT'S AN ELEMENT THAT YOU
12:12PM 3 RECOGNIZE THAT YOU'LL HAVE TO BEAR OR THAT CHARGE WILL BE DEALT
12:12PM 4 WITH ON A RULE 29 MOTION OR AN INSTRUCTION OR SOME OTHER
12:13PM 5 METHOD?

12:13PM 6 MR. BOSTIC: WELL, YOUR HONOR, I WANT TO MAKE SURE I
12:13PM 7 UNDERSTAND THE COURT'S QUESTION.

12:13PM 8 MY REACTION IS THAT NONE OF THE INDIVIDUAL COUNTS DEPEND
12:13PM 9 ON THE THEORY OF DOCTORS PASSING ALONG FALSE INFORMATION TO
12:13PM 10 PATIENTS. SO WERE THAT NOT THE CASE, THE COUNTS IN THE
12:13PM 11 INDICTMENT WOULD BE THE SAME, BUT BECAUSE THAT IS ALLEGED,
12:13PM 12 BECAUSE THE ROLE OF DOCTORS IS ALLEGED IN THE INDICTMENT, IT
12:13PM 13 HAS THE SAME STATUS AT TRIAL AS OTHER ALLEGATIONS IN THE
12:13PM 14 INDICTMENT, ALLEGATIONS THAT THE DEFENDANTS USED JOURNALISTS,
12:13PM 15 ALLEGATIONS THAT THE DEFENDANTS EMPLOYED MARKETING MATERIALS.
12:13PM 16 IT SITS IN A SIMILAR POSITION AS THOSE OTHER ALLEGATIONS IF
12:13PM 17 THAT ANSWERS THE COURT'S QUESTION.

12:13PM 18 THE COURT: ALL RIGHT. SO IF A DOCTOR TESTIFIES I
12:13PM 19 REFERRED THEM TO THERANOS JUST BECAUSE I WAS GOING DOWN THE
12:13PM 20 ALPHABET AND "T" WAS THE NEXT LETTER, AND THAT'S WHAT I DID,
12:13PM 21 AND I PAID NO ATTENTION TO ANYTHING ELSE.

12:14PM 22 THERE'S A FAILURE OF PROOF THERE?

12:14PM 23 MR. BOSTIC: WELL, I THINK THEN, YOUR HONOR, WE NEED
12:14PM 24 TO KEEP IN MIND THAT WHAT IS ALLEGED IN THE INDICTMENT AND WHAT
12:14PM 25 IS CRIMINALIZED IS THE SCHEME TO DEFRAUD ITSELF. SO THE FOCUS

12:14PM 1 IS ON DEFENDANT'S INTENT.

12:14PM 2 THE GOVERNMENT CITES SEVERAL CASES STANDING FOR THE
12:14PM 3 PROPOSITION THAT A FRAUD DOESN'T NEED TO BE SUCCESSFUL IN ORDER
12:14PM 4 FOR THERE TO BE CRIMINAL LIABILITY.

12:14PM 5 SO I THINK IT WOULD BE THE WRONG FACTS TO FOCUS ON, TO
12:14PM 6 FOCUS ON WHETHER THIS SCHEME WAS ACTUALLY SUCCESSFUL. IT WOULD
12:14PM 7 BE WRONG TO FOCUS ON WHETHER THE DEFENDANT SUCCEEDED IN
12:14PM 8 DECEIVING DOCTORS, WRONG TO FOCUS ON WHETHER FALSE INFORMATION
12:14PM 9 WAS ACTUALLY PASSED FROM DOCTORS TO PATIENTS. THAT DOESN'T
12:14PM 10 NEED TO BE PROVEN. INSTEAD, IT ONLY NEEDS TO BE PROVEN THAT
12:14PM 11 THAT WAS THE DEFENDANT'S INTENT.

12:14PM 12 THE COURT: OKAY. MS. TREFZ.

12:14PM 13 MS. TREFZ: YES. AGAIN, YOUR HONOR, JUST TO
12:14PM 14 REITERATE, THERE'S NO ALLEGATION IN THE INDICTMENT THAT THE
12:15PM 15 DEFENDANTS, IN FACT, INTENDED TO HAVE THESE DOCTORS PASS ALONG
12:15PM 16 THIS INFORMATION TO PATIENTS, RATHER I THINK THE INDICTMENT
12:15PM 17 FAIRLY READ CASTS AS BOTH INDEPENDENT VICTIMS, AND THAT MAKES
12:15PM 18 SENSE BECAUSE IT IS IN THIS RESPECT VERY SIMILAR, ALMOST
12:15PM 19 IDENTICAL WITH THE EXCEPTION OF SOME OF THE HEADINGS TO THE
12:15PM 20 PRIOR INDICTMENT.

12:15PM 21 THE COURT: OKAY. ALL RIGHT.

12:15PM 22 MR. BOSTIC: YOUR HONOR, I'M SORRY. BRIEFLY ON THAT
12:15PM 23 POINT. I WOULD ALSO JUST LIKE TO SAY A FEW WORDS ON THE
12:15PM 24 CONVERGENCE CASE LAW IF THE COURT DOESN'T MIND.

12:15PM 25 THE COURT: SURE.

1 MR. BOSTIC: ON THAT POINT I WOULD REFER THE COURT
2 TO PARAGRAPHS 15 AND 22 IN THE INDICTMENT. AGAIN, THIS IS ALL
3 IN THE CONTEXT OF THE ALLEGED SCHEME TO DEFRAUD PATIENTS.
4 THERE IS NO ALLEGATION, EXPRESS OR IMPLIED, THAT DOCTORS WERE
5 ALSO STANDALONE VICTIMS.

6 PARAGRAPHS 15 AND 22 MAKES CLEAR THE RELATIONSHIP BETWEEN
7 DOCTORS AND PATIENTS IN THIS CASE, AND, IN FACT, IN ITS LAST
8 ORDER WHEN WE WERE DISCUSSING THE ROLE OF DOCTORS, THE COURT
9 NOTED THAT LANGUAGE, AND IN COMPARISON TO THE CICCONE CASE THE
10 COURT NOTED THAT DOCTORS IN THIS CASE COULD BE ANALOGIZED TO
11 THE TELE MARKETER EMPLOYEE/AGENTS OF THE DEFENDANTS IN THAT
12 OTHER CASE.

13 SO THE GOVERNMENT HEARD THAT AND THAT SQUARES WITH THE
14 GOVERNMENT'S UNDERSTANDING OF HOW DOCTORS FUNCTIONED HERE,
15 ALTHOUGH THEY WERE NOT AGENTS OR COCONSPIRATORS OF THE
16 DEFENDANTS, BUT THE GOVERNMENT'S CURRENT THEORY, THE WAY THE
17 INDICTMENT TREATS DOCTORS IS TOTALLY CONSISTENT WITH THE THEORY
18 BLESSED IN THE CICCONE CASE.

19 I'LL ALSO JUST POINT OUT THAT AGAIN THE DEFENSE IS SEEKING
20 TO ENHANCE THE CONVERGENCE REQUIREMENT HERE. THERE IS NO CASE
21 LAW SUPPORTING THE IDEA THAT THERE NEEDS TO BE A ONE-TO-ONE
22 CONNECTION BETWEEN DEFENDANTS AND VICTIM. THERE IS NO
23 REQUIREMENT THAT A DEFENDANT DIRECTLY MAKE MISREPRESENTATIONS
24 TO A VICTIM.

25 AND, INDEED, THINK OF THE TYPES OF FRAUD THAT WOULD TAKE

12:17PM 1 OUT OF CRIMINAL LAW IF THAT WERE INDEED THE CASE.

12:17PM 2 THE IDEA THAT IT'S NOT FRAUD IF A DEFENDANT DECEIVES A
12:17PM 3 VICTIM THROUGH AN INTERMEDIARY IS A DANGEROUS IDEA THAT THE
12:17PM 4 COURTS HAVEN'T BLESSED AND RIGHTLY SO. THINK OF THE SITUATIONS
12:17PM 5 WHERE A BUSINESS NEGOTIATION PROCEEDS THROUGH LAWYERS AS
12:17PM 6 INTERMEDIARIES. IF A FRAUDSTER INTENDED TO DECEIVE THE OTHER
12:17PM 7 PARTY IN A NEGOTIATION BY MAKING FALSE PRESENTATIONS TO THAT
12:17PM 8 PARTY'S LAWYER IN HOPES THAT THAT LAWYER WOULD PASS ON THAT
12:17PM 9 FALSE INFORMATION TO THEIR CLIENT, THAT WOULD CERTAINLY BE
12:17PM 10 FRAUD. THE INTENT IS STILL TO DECEIVE THE ULTIMATE VICTIM, TO
12:17PM 11 OBTAIN MONEY FROM THAT VICTIM.

12:17PM 12 AND THE SAME THING IS HAPPENING HERE. JUST AS LAWYERS
12:17PM 13 OFTEN SERVE AS REPRESENTATIVES OF PRINCIPALS IN NEGOTIATIONS,
12:18PM 14 HERE IN THIS CASE DOCTORS REPRESENTED THEIR PATIENTS IN
12:18PM 15 CONNECTION WITH THEIR DEALINGS WITH LABS.

12:18PM 16 AND ALTHOUGH THAT COULD HAVE BEEN SPELLED OUT IN MORE
12:18PM 17 DETAIL IN THE INDICTMENT, AS THE COURT KNOWS THAT'S NOT THE
12:18PM 18 STANDARD AT THIS STAGE. INDICTMENTS ARE NOT COMPARED TO THE
12:18PM 19 IDEAL MOST DETAILED VERSIONS THAT THEY COULD HAVE BEEN.
12:18PM 20 INSTEAD THE QUESTION IS WHETHER THEY PROVIDE SUFFICIENT NOTICE,
12:18PM 21 AND THIS ONE DOES.

12:18PM 22 THE COURT: ALL RIGHT. THANK YOU VERY MUCH.

12:18PM 23 MS. TREFZ, ANYTHING IN CLOSING?

12:18PM 24 MS. TREFZ: YOUR HONOR, I JUST REITERATE THAT I
12:18PM 25 HEARD MR. BOSTIC MENTION THAT THE INTENT TO DECEIVE NEEDS TO

12:18PM 1 BE, YOU KNOW, TO THE SAME VICTIM, WHETHER OR NOT IT'S THROUGH
12:18PM 2 AN INTERMEDIARY.

12:18PM 3 I WOULD NOTE THAT THE NINTH CIRCUIT HAS NOT BLESSED THIS
12:18PM 4 INTERMEDIARY THEORY THAT THE GOVERNMENT IS SETTING FORTH HERE
12:18PM 5 AND ALSO, AGAIN, THERE ISN'T AN ALLEGATION IN THE INDICTMENT
12:18PM 6 THAT INTENDED -- THAT STATEMENTS TO DOCTORS WERE INTENDED TO BE
12:19PM 7 AIMED AT PATIENTS.

12:19PM 8 THE COURT: ALL RIGHT. ALL RIGHT. WELL, THANK YOU
12:19PM 9 VERY MUCH. THIS HAS BEEN VERY HELPFUL.

12:19PM 10 AS I SAID, I DON'T NEED ANY HELP ON 500. I THINK THE 500
12:19PM 11 WAS -- I LOOKED AT IT, AND PARDON ME, I DON'T MEAN TO SAY IT
12:19PM 12 WASN'T IMPORTANT, BUT I THINK THE PROMINENCE OF 500 WAS TO
12:19PM 13 PRESERVE THE PRIOR ARGUMENTS THAT WERE MADE. AND, OF COURSE,
12:19PM 14 THAT'S WHAT IT DOES. IT'S UNDER SUBMISSION AS WELL.

12:19PM 15 MS. MCDOWELL, MR. DOWNEY, MR. WADE, MR. CAZARES,
12:19PM 16 MR. SCHENK, I DIDN'T HAVE THE PRIVILEGE OF SPEAKING WITH YOU
12:19PM 17 THIS MORNING, BUT THANK YOU FOR YOUR SUPPORT. IT'S GOOD TO SEE
12:19PM 18 YOU AS WELL AS YOUR COLLEAGUES AND YOUR COLLEAGUES OPPOSITE
12:19PM 19 HERE. SO THANK YOU FOR THAT.

12:19PM 20 UNLESS THERE'S ANYTHING FURTHER BY ANY PARTY, I'LL JUST
12:19PM 21 INDICATE AS I DID AT THE OUTSET THAT THESE MOTIONS, EACH OF
12:19PM 22 THEM ARE NOW UNDER SUBMISSION, AND IT'S MY INTENT TO GET ORDERS
12:20PM 23 OUT FOR YOU TO HELP YOU ON THESE SHORTLY SO WE CAN EITHER
12:20PM 24 CONTINUE THE CASE OR CONTINUE THE LITIGATION IN SOME MANNER.

12:20PM 25 SO UNLESS THERE'S ANYTHING FURTHER, I'LL WISH YOU ALL GOOD

12:20PM 1 HEALTH, STAY HEALTHY, STAY SAFE, AND I LOOK FORWARD TO SEEING
12:20PM 2 EVERYONE AGAIN SOON. THANKS VERY MUCH.

12:20PM 3 MS. KRATZMANN, WE'LL ADJOURN THIS PROCEEDING. THANK YOU.

12:20PM 4 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

12:20PM 5 MR. LEACH: THANK YOU, YOUR HONOR.

12:20PM 6 MS. SAHARIA: THANK YOU, YOUR HONOR.

12:20PM 7 THE CLERK: COURT IS ADJOURNED. THE MEETING SHALL
12:20PM 8 END.

12:20PM 9 (COURT CONCLUDED AT 12:20 P.M.)

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

IRENE RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

DATED: OCTOBER 15, 2020